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In the Supreme Court of the United States

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

vs.

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Individuals with Disabilities Education Improvement Act (hereinafter "IDEA" or "IDEIA"), 20 U.S.C. § 1400, *et seq.*, allows the local educational agency to **unilaterally** select and determine school placement *situs* **after** the student's "Individualized Education Plan" meeting without first having a discussion with the student's parents.

2. Whether the IDEA and this Court's prior decisions require direct and meaningful participation of the student's parents as "team" members in the process of identifying and selecting a school site for the student before such *situs* is selected by the local educational agency.

3. Whether the Second Circuit correctly ruled that placement *situs* selection is a mere "bricks and mortar" ministerial decision that does not require the direct, prior and meaningful involvement and participation of the student's parents as informed members of the IEP team.

4. Whether courts may look outside the "four corners" of the written IEP in analyzing whether the content of the IEP provides the student with a FAPE.

5. Whether the Second Circuit contravened this Court's "ordinary meaning" rule of statutory construction by holding that the undefined IDEA term "location" does not mean a specific school *situs* and is only a reference to the student's "program" of services.

6. Whether the Second Circuit imposed an impermissibly high standard of post-IEP conduct on the student's parents in contravention of this Court's decisions in *Forest Grove School District v. T.A.*, 129 S.Ct. 2484 (2009) and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993).

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K.Y. and T.Y., individually and on behalf of their minor child, T.Y., respectfully petition for a writ of certiorari to review the judgments of the U.S. Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decisions of the U.S. Court of Appeals for the Second Circuit are reported at 584 F.3d 412 (2d Cir. 2009) and are reproduced at App. to Pet. Cert. 1. The decisions of the U.S. District Court for the Eastern District of New York are not officially reported but are available at 2008 U.S. Dist. LEXIS 89827 and are reproduced at App. to Pet. Cert. 15 and App. to Pet. Cert. 31. The decision of New York's Office of State Review is reported on its website at http://www.sro.nysed.gov/decisionindex/2007/07-010.pdf and is reproduced at App. to Pet. Cert. 33. The decision of the Impartial Hearing Office is not publicly available but is reproduced at App. to Pet. Cert. 71.

JURISDICTION

The judgment of the Second Circuit affirming the district court was issued on October 9, 2009. App. to Pet. Cert. 1. Petitioner's petition for rehearing and rehearing en banc was then denied by decision dated December 7, 2009 and is reproduced in the Appendix herein at App. to Pet. Cert. 105. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

"The Individuals with Disabilities Education Act of 2004," 20 U.S.C. § 1414(d)(1)(A)(i)(VII), provides:

> (d) Individualized education programs.
>
> (1) Definitions. In this title [20 U.S.C. § 1400, *et seq.*]
>
> (A) Individualized education program.
>
> (i) In general. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –
>
> (VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications.

"The Individuals with Disabilities Education Act of 2004," 20 U.S.C. § 1414(e), provides:

> (e) Educational placements. Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

The IDEA 2004 Regulations, 34 C.F.R. § 300.501, provides:

> (a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of § 300.613 through 300.621, an opportunity to inspect and review all education records with respect to –
>
> (1) The identification, evaluation, and educational placement of the child; and
>
> (2) The provision of FAPE to the child.
>
> (b) Parent participation in meetings.
>
> (1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to –
>
> (i) The identification, evaluation, and educational placement of the child; and
>
> (ii) The provision of FAPE to the child.
>
> (2) Each public agency must provide notice consistent with §§ 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.
>
> (3) A meeting does not include informal or unscheduled conversations involving

public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) Parent involvement in placement decisions.

(1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in §§ 300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent,

> if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

STATEMENT OF FACTS

Petitioners reside in New York City in the Borough of Queens. Petitioner T.Y. is a child with autism. He was four years old at the time of his May 10, 2006 meeting held to develop an Individualized Education Program (hereinafter "IEP") for purposes of the 2006-2007 school year. Petitioners K.Y. and T.Y. are T.Y.'s parents. T.Y.'s father, K.Y., is a steamfitter. *See* App. to Pet. Cert. 108. During the 2005-2006 school year, pursuant to an IEP, T.Y. received special education services from the local educational agency, *i.e.*, respondent New York City Department of Education, through its Committee on Preschool Special Education.

On September 5, 2006, T.Y.'s parents filed for an impartial hearing for the 2006-2007 school year pursuant to *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), and *Florence County School District Four v. Carter*, 510 U.S. 7 (1993). T.Y.'s parents filed a request for an impartial hearing (also known as a request for due process) after the May 10, 2006 IEP meeting and in anticipation of T.Y.'s transfer to respondent's CSE.[1]

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[1] In New York City, the Committee on Special Education takes over the role of providing services to students at the time the student turns five years old.

T.Y.'s parents filed an impartial hearing request in an effort to secure reimbursement relief to pay for T.Y.'s tuition at the Rebecca School, a private school for children with autism. Petitioners alleged in their request for due process that, both procedurally and substantively, respondent failed to provide T.Y. with a FAPE. *See* App. to Pet. Cert. 117.

The record below reflects that T.Y.'s parents attended T.Y.'s May 10, 2006 IEP meeting. Whatever else may have happened at T.Y.'s IEP meeting, respondent conceded at the hearing below that it never addressed or discussed the highly important issue of school placement selection, *i.e.*, identifying the location of the actual school site that ostensibly would be appropriate to meet T.Y.'s unique and individual needs. *See* App. to Pet. Cert. 114. T.Y.'s parents were not afforded that basic opportunity as "team" members because, in New York City, the IEP team apparently never even discusses, much less identifies, the school placement location at the student's IEP.[2]

Respondent contended before the Second Circuit, just as it had done before the district court, that the question of school site selection was a mere, ministerial "bricks and mortar" decision that did not require the active participation of T.Y.'s parents. Here, without any advance discussion with T.Y.'s parents, respondent simply mailed T.Y.'s parents a notice telling them what school site respondent had

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[2] In New York City, there are 338 "District 75" classrooms. *See* http://schools.nyc.gov/documents/d75/schools/DIRECTORY_complete.pdf.

unilaterally selected for T.Y. *See* App. to Pet. Cert. 127. T.Y.'s parents rejected the proposed placement on written notice to respondent. *See* App. to Pet. Cert. 125.

The Second Circuit apparently accepted respondent's "bricks and mortar" argument – the notion that specific school placements are all fungible and interchangeable, and thus can properly be selected by the school district for a child with a serious disability without meaningful prior parental inclusion and participation in the selection process. *See* App. to Pet. Cert. 11-13. There now exists a serious conflict in the circuits on this point.

The Second Circuit failed to appreciate that a parent of a child with autism or any other serious disability would normally have many questions that would need to be addressed by the IEP "team" to make any kind of informed decision as to school *situs* selection. In order to have the opportunity for meaningful input, a responsible parent might need to pose questions such as:

- ✓ How close is the proposed school to our home?
- ✓ What kinds of other disabilities are serviced at the proposed school site?
- ✓ What is the age range and functioning levels of the children who would be my child's classmates?

- ✓ Are there any children in the classroom with dangerous or otherwise problematic behaviors?
- ✓ Will my child have to navigate stairwells?
- ✓ How "verbal" are the other children in the proposed classroom?
- ✓ What parent training does the proposed school site offer?
- ✓ What kinds of after-school activities are made available?
- ✓ Are there any interactions with non-disabled peers?

Such questions far transcend the unduly simplistic "bricks and mortar" site selection approach accepted by the Second Circuit. Schools, like children, are often quite different from one another.

The Second Circuit correctly held in its decision that it should follow a multistep process to determine petitioners' claim for tuition reimbursement by initially asking two "Prong I" questions: (a) whether the local educational agency has complied with the applicable procedural requirements (*i.e.*, a procedural FAPE challenge); and (b) whether the IEP is reasonably calculated to enable the student to receive educational benefits (*i.e.*, a substantive FAPE challenge).

As the Second Circuit properly recognized, "if the answer to either of these questions is 'no,' we then ask whether the private school obtained by the parents is appropriate to the child's needs." *See* App. to Pet. Cert. 7. Unfortunately, however, the Second Circuit never reached the second question. It simply held that there were no procedural or substantive FAPE violations that would suffice to trigger "Prong I."

As to procedural compliance, the Second Circuit held that respondent afforded T.Y.'s parents adequate participation in the process of school *situs* selection and that "the parents then enrolled the child into the Rebecca School without **allowing** the NYCDOE an opportunity to offer yet another school." *See* App. to Pet. Cert. 13 (emphasis added). The Second Circuit blamed the wrong party.[3]

As early as *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court highlighted and has presumed "the congressional emphasis upon full participation of the concerned parties throughout the development of the IEP." *See also Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Winkelman v. Parma City School District*, 127 S.Ct. 1994 (2007); 34 C.F.R. § 300.501(c)(1). This Court has consistently **presumed** that parents have the opportunity for full participation as equal members of the IEP team.

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[3] In *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009), this Court held that parents have standing to challenge a violative IEP scenario without being under any obligation to try out the school district's offering.

This Court held in *Forest Grove v. T.A.*, 129 S.Ct. 2484 (2009), that parents have standing to challenge a violative IEP without being under any obligation to try out the school district's offering. However, the Second Circuit held T.Y.'s parents to an impermissibly elevated standard. The Second Circuit's holding implicitly requires parents to wait indefinitely for the school district to make an appropriate program and placement recommendation. As this Court recognized in *Forest Grove*, children with serious disabilities simply cannot wait indefinitely, and parents should be able (under the IDEA) to unilaterally place their disabled child in a private placement **without** trying an inappropriate placement or waiting beyond the commencement of the school year. *Id.*

Petitioners called the attention of the Second Circuit to applicable statutory provisions, including 20 U.S.C. § 1414(e) and 34 C.F.R. § 300.501(c)(1), providing that "each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child." The Second Circuit, however, accepted respondent's "bricks and mortar" argument without even **addressing** the impact of the applicable statute.

Instead of addressing 34 C.F.R. § 300.501(c)(1), the Second Circuit focused exclusively on 34 C.F.R. § 300.501(b)(1)(i), thus focusing on what happened during the course of T.Y.'s IEP meeting. However, it neglected to assess the consequences where, as here, **after** the IEP meeting, respondent's placement officer unilaterally dictated school placement *situs*

selection without first meeting or even consulting with the student's parents as part of the process. Here, T.Y.'s parents were excluded from that decision-making process.

The Second Circuit also disregarded as immaterial the **substantive** violations alleged by petitioners, including but not limited to evidence and judicial **findings** below that respondent had failed to offer T.Y., a student with autism, adequate speech and language therapy, and had also failed to make express provision in the IEP for **any** statutorily mandated "parent training and counseling." *See* App. to Pet. Cert. 10. Inexplicably, the Second Circuit concluded – erroneously we contend – that any such substantive violations somehow were "corrected." [4] *See* App. to Pet. Cert. 10.

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[4] The IEP in question, dated May 10, 2006, made no provision whatsoever for statutorily mandated "parent training and counseling" as required by the regulations of the Commissioner of New York. N.Y. Comp. Codes & Reg., tit. 8, § 200.13(d); *see also* 34 C.F.R. § 300.34. The so-called "correction" did not occur, if at all, until at least April 2, 2007, when the State Review Officer adjudicated this deficiency App. to Pet. Cert. 60. However, this was almost at the *end* of the school year in question. How, if at all, was respondent's statutory failure ever "corrected" for the first ten months of the 2006-2007 school year?

REASONS FOR GRANTING THE WRIT

The Second Circuit affirmed the District Court's judgment that had sanctioned, as entirely appropriate under the IDEA, New York City's relatively rogue practice and policy of **unilaterally** determining and selecting school placement *situs* for students with disabilities **after** the student's IEP meeting has taken place and **without** parental inclusion and discussion in the decision-making process. *See* App. to Pet. Cert. 10-13. The requisite parental involvement as team members simply cannot occur where, as here, the local educational agency sends the student's parents a piece of paper unilaterally selecting the school site, with no prior discussion having taken place with the student's parents.

In New York City, the student's placement *situs* is not even discussed or identified, much less decided and selected, at the student's IEP meeting. Indeed, the school site that respondent unilaterally selected for T.Y. does not appear anywhere within the four corners of T.Y.'s IEP. T.Y.'s school placement site for the 2006-2007 school year was unilaterally selected by a placement administrator who had not even attended T.Y.'s IEP meeting. *See* App. to Pet. Cert. 127.

The Second Circuit thus accepted respondent's argument that the issue of school placement selection, *i.e.*, the overarching and fundamental question of "what school placement site is being recommended for my child?" is a mere "bricks and mortar" ministerial issue that may be unilaterally

decided by an administrative functionary, and does not require the collaborative, informed "team" approach that this Court's previous decisions clearly expect. *See Board of Education v. Rowley*, 458 U.S. 176 (1982); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007); *Schaffer v. Weast*, 546 U.S. 49 (2005); *Forest Grove*, 129 S. Ct. at 2484.

This petition for writ of certiorari should be granted to resolve not one, but **two** conflicts now existing in the circuits. Initially, the Second Circuit's decision and rationale is in direct conflict with the prior decision of the Fourth Circuit in *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007), where the school district violated the IDEA by not specifying the specific school *situs* on the student's IEP.

The situation in the case at bar is even more egregious than in *A.K.* Here, respondent did not merely fail to specify the school site in T.Y.'s IEP. Here, the specific school site was not even discussed at T.Y.'s IEP meeting, or after. School *situs* selection was unilaterally selected by respondent without any discussion. *See* App. to Pet. Cert. 114. This is the slippery slope that arises whenever school districts get the idea that it is acceptable to exclude parents from a process that is supposed to be a "team" decision.

There is also a related conflict among the circuits concerning whether courts are empowered to look outside the "four corners" of the written IEP document to determine whether the school district has offered FAPE. Three circuits have held that

when considering "Prong I" of the classic *Burlington/Carter* test for reimbursement, courts may consider only the written IEP document. *See, e.g., Sytsema v. Academy Sch. Dist.*, 538 F.3d 1306 (10th Cir. 2008); *A.K.*, 484 F.3d at 672; *Union Sch. Dist. v. Smith*, 15 F.3d 1519 (9th Cir. 1994).

Three circuits have held to the contrary – that courts may look beyond the actual IEP document. *See, e.g., C.G. v. Five Town Community Sch. Dist.*, 513 F.3d 279 (1st Cir. 2008); *John M. v. Bd. of Educ.*, 502 F.3d 708 (7th Cir. 2007); *Doe v. Defendant I*, 898 F.2d 1186 (6th Cir. 1990). In the case at bar, of course, respondent never specified a school site on T.Y.'s IEP. *See* App. to Pet. Cert. 114.

There is no doubt that respondent's parent-exclusionary practice concerning the selection of school placement *situs* is undoubtedly more administratively convenient. To be certain, there are all kinds of savings in terms of time and money that can be achieved each and every time a municipality makes the policy decision to throw fundamental statutory safeguards out the window.[5]

It is essential that this Court grant certiorari in light of: (a) the conflict created by the Second Circuit's ruling in the case at bar; (b) the Fourth Circuit's directly conflicting decision in *A.K.*; (c) the

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[5] U.S. District Court Judge Jed Rakoff, in rejecting the settlement that Bank of America had offered to pay to the SEC, recently invoked Oscar Wilde's insight that "a cynic is someone who knows the price of everything and the value of nothing." *SEC v. Bank of Am. Corp.*, 2010 U.S. Dist. LEXIS 179 (S.D.N.Y. Jan. 4, 2010).

Fifth Circuit's decision in *White v. Ascension Parish School Board*, 343 F.3d 373 (5th Cir. 2003); and (d) the related split among the circuits concerning the Prong I "four corners of the IEP" issue. Review by this Court is required to resolve the existing conflicts between the circuits, as well as to ensure that school districts and parents will collaboratively work together as a "team" to make informed placement decisions that often can mean the difference between success and failure for a child. The issue of identifying and recommending the school that a student with a disability should attend is far too important an issue to be left to a "placement" administrator who has never met the student and has never attended the student's IEP meeting.

I. THERE EXISTS AN UNHELPFUL SPLIT BETWEEN THE CIRCUITS THAT THIS COURT SHOULD RESOLVE TO PROVIDE CONSISTENCY IN THE IEP DEVELOPMENT PROCESS AND ENSURE THE ACTIVE AND MEANINGFUL PARTICIPATION OF PARENTS AS EQUAL MEMBERS OF THE IEP TEAM

As this Court held in *Winkelman*, the IDEA grants parents independent enforceable rights which are not limited to procedural and reimbursement related matters, but encompass the entitlement to a FAPE for their child. 550 U.S. at 533. In *Winkelman*, this Court went on to explain that many of the IDEA's provisions mandate or otherwise describe parental involvement: parents "play a significant role." *Id.* at 524 (citing *Schaffer*, 546 U.S. at 53); *See also* 20 U.S.C. § 1414(c).

Among the "independent enforceable rights" that this Court expressly recognized in *Winkelman* is 20 U.S.C. § 1414(c), mandating states to "establish and maintain procedures ... to ensure that parents are members of any group that makes decisions on the educational **placement** of their child" (emphasis added). The IDEA also establishes "general procedural safeguards that protect the **informed** involvement of parents." *Winkelman*, 550 U.S. at 524 (emphasis added).

Here, respondent apparently has elected to follow a custom and practice that studiously **avoids** maintaining any such procedures. The decision to place a student in a specific placement location is not one that is discussed at the IEP meeting with the

student's parents present as "members" of the IEP team. *See* App. to Pet. Cert. 117.

Even after T.Y.'s IEP meeting, respondent put no procedures in place to put T.Y.'s parents in the sphere of placement site decision-making **before** respondent selected T.Y.'s school and made its "final" recommendation. Here, respondent unilaterally **dictated** placement site selection without parental inclusion and discussion, effectively cutting T.Y.'s parents out of the school site selection process altogether. If, as this Court held in *Winkelman*, T.Y.'s parents have independent rights under the IDEA to participate as equal members of the IEP team as to material educational planning; such rights were egregiously trampled on by respondent's unilateral conduct here. We do not throw such rights out the window just because we are enduring a recession and compliance is less convenient for respondent.

As noted above, the Second Circuit's decision is in direct conflict with the prior decision of the Fourth Circuit Court of Appeals in *A.K.*, which held that the school district violated the IDEA by not specifying a school site on the student's IEP. *See A.K.*, 484 F.3d at 672. In light of the Second Circuit's holding that the school placement location did not have to be discussed or decided at T.Y.'s IEP meeting, there is also now a related, and equally irreconcilable conflict between the circuits concerning whether or not courts may look outside the "four corners" of the written IEP documents to determine whether the school district has provided FAPE.

Three circuit courts have held that when analyzing the content of an IEP, courts should consider only the written IEP. *See, e.g., Sytsema*, 538 F.3d at 1315; *A.K.*, 484 F.3d at 681-82; *Union Sch. Dist. v. Smith*, 15 F.3d at 1525-26. Three circuit courts have now held precisely to the contrary. *See, e.g., Doe v. Defendant I*, 898 F.2d at 1186; *John M.*, 502 F.3d at 715; *C.G. v. Five Towns*, 513 F.3d at 285. Therefore, it is essential that this Court allow review in order to resolve the two conflicts that exist among the circuits. This Court's review is needed to clarify the IEP development process, and to give effect to this Court's holding in *Winkelman* and other seminal decisions of this Court that have recognized the importance of fulfilling and enforcing the IDEA's procedural safeguards *vis-à-vis* meaningful parental involvement before education decisions are made. *See also Deal v. Hamilton County Board of Educ.*, 392 F.3d 840 (6th Cir. 2004) (recognizing that "predetermination" by the local educational agency is impermissible under the IDEA).

No parent is entitled to any guarantee as to the outcome of the IEP process. On the other hand, every parent is guaranteed genuine inclusion as a team member at every stage of IEP development.

II. NEW YORK CITY IS NOT ENTITLED TO A SPECIAL EXEMPTION FROM THE REQUIREMENTS OF THE IDEA

In *Forest Grove*, this Court held that the IDEA does not prohibit reimbursement relief for private education costs if the student has "not previously received special education and related services under the authority of a public agency." 129 S.Ct. 2489. In so doing, this Court firmly rejected the school district's argument that such a holding would "impose a substantial financial burden" on public school districts and encourage parents to immediately enroll their children in private school without first endeavoring to cooperate with the school district.[6] *Id.* at 2496. Accordingly, it is now well settled that parents have standing to challenge alleged FAPE deprivations without having to first "try out" the school district's offering.

Here, despite respondent's unilateral action in site selection, the Second Circuit faulted T.Y.'s **parents** for not trying harder to avoid due process. Even though T.Y.'s parents attended T.Y.'s IEP meeting in good faith, visited the "final" recommended placement, and timely rejected the placement offer, T.Y.'s parents did not file for due process until after respondent **unilaterally** selected T.Y.'s school site. Rather than fault respondent for

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[6] *See also Carter*, 510 U.S. at 15 (school officials who conform to IDEA's mandate "need not worry about reimbursement claims"); *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 77 (1999) (rejecting the school district's request "to establish a kind of undue-burden exemption").

excluding T.Y.'s parents in the school site selection process, the Second Circuit decided that T.Y.'s parents were blameworthy for not trying harder to coax respondent into compliance. *See* App. to Pet. Cert. 13-14.

Where, as here, a student and his parents are excluded from the process of the site selection decision by a school district that has decided not to comply with the IDEA's basic requirements, we urge that parents are not required to wait indefinitely for the school district to make an **appropriate** placement recommendation. The Second Circuit's rationale directly contravenes this Court's decision in *Forest Grove*. Specifically, if a student does not have to first "try out" the school district's offered placement, then it logically follows that parents can then unilaterally place their child privately and seek redress. To win relief, the parent must still prove that the local educational agency materially deprived their child of a "free appropriate public education" under the *Burlington/Carter* reimbursement test, and that the private placement is appropriate for the student.[7]

Once parents have been excluded, we urge that parents need not grovel or otherwise offer themselves up for further injury. For T.Y., the 2006-2007 school year was about to start, and there was

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[7] Reference is made to the seminal authorities of *School Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985) and *Florence County School Dist. Four v. Carter*, 510 U.S. 7 (1993). *See also Frank G. v. Board of Educ.*, 459 F.3d 356 (2d Cir. 2006); *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

little time to waste. Respondent charted its own course with its violative custom and practice of **unilaterally** selecting T.Y.'s school placement *situs*. Under such egregious circumstances, we urge that T.Y.'s parents were entirely within their rights to proceed to file for a due process hearing when they did. To require more of parents would only encourage school districts to exclude parents from the placement decision-making process.

Each year, New York City accepts many millions of dollars in federal IDEA funding. Such funding comes with a *quid pro quo* – compliance with the procedural and substantive requirements of the statute. New York City is not entitled to a special exemption from the requirements of the IDEA simply because compliance may be more expensive or time-consuming. As this Court held long ago in *Carter*:

> "There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public authorities who want to avoid reimbursing parents for the private education of a disabled child can [comply with the statute]. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims."[8] 510 U.S. at 15.

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[8] While New York City, like all municipalities, struggles to balance its budget as the nation begins to recover from a world-wide recession, it is important to bear in mind that respondent's unilateral and violative acts took place during a time of relative fiscal **abundance**. *See Cedar Rapids Community School District v. Garret F.*, 526 U.S. at 66 (rejecting school district's

School districts across the nation are aware of the Second Circuit's decision in the case at bar. They are keenly aware of the two existing conflicts between the circuits, discussed *supra*. If this Court were not to allow review, the existing conflicts would only spread, and more school districts would become emboldened to **deprive** parents of their rights to meaningfully participate in the IEP development process, including the selection of school placement *situs*, as equal members of the IEP team. Parental exclusion is not what Congress intended, and it is certainly not what this Court intended in *Winkelman* when it recognized the importance and expectation of parental participation rights as equals members of the IEP team. These rights must be honored in order to preserve public confidence in the integrity of the system.

III. THE SECOND CIRCUIT MISAPPLIED THE STATUTE AND SHOULD HAVE DEFINED THE UNDEFINED TERM "LOCATION" ACCORDING TO ITS "ORDINARY MEANING"

Where, as here, the word "location" is not expressly defined in the IDEA, this Court's controlling rule of interpretation is that such term must be given its "ordinary" meaning. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995); *Forest Grove*, 129 S. Ct. at 2490 ("we noted that 'the ordinary meaning of these words' confers broad discretion on the court"). The term "location" also appears in the IDEA's implementing regulations, 34

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request for a financial hardship exemption from the requirements of the IDEA).

C.F.R. § 300.345, where the school district must provide notice to the parent of the "location" of the student's IEP meeting, *i.e.*, the *situs* and place of the IEP meeting.

We urge that the Second Circuit contravened this Court's controlling rule of construction and interpretation by deferring to a contrary agency interpretation and by holding that " 'location' does not mean that the IEP must specify a specific school site," but simply "refers only to the general educational **program.**" *See* App. to Pet. Cert. 12 (emphasis added). The Second Circuit inexplicably ignored 20 U.S.C. 1414(e) and 34 C.F.R. § 300.501(c)(1). Placement decisions, whether made at the IEP meeting or in the context of some other meeting, must always include direct parental participation, unless, of course, the student's parents refuse to participate.

Regarding the IEP meeting, 34 C.F.R. 300.501(b)(1)(i), entitled "Parent Participation In Meeting," provides that "the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation and educational placement of the child." Similarly, 34 C.F.R. § 300.501(a)(1) provides that "the parents of a child with a disability must be afforded ... an opportunity to inspect and review all education records with respect to ... the identification, evaluation, and *educational placement* of the child" (emphasis added).

On the other hand, 34 C.F.R. § 300.501(c)(1)[9], entitled "Parent Involvement in Placement Decisions," mandates protection for parents that goes beyond the IEP meeting. It states that "each public agency shall ensure that the parents of each child with a disability are **members** of any group that makes decisions on the educational placement of their child" (emphasis added). Subsequent subsections, 34 C.F.R. §§ 300.501(3) and (4), further direct the local educational agency to take steps to ensure the attendance and participation of the child's parent and state that "a placement decision may be made by a **group** without the involvement of the parents, if the public agency is unable to obtain the parents' participation in the **decision**" (emphasis added).[10] *See also Winkelman*, 550 U.S. at 524.

While the Second Circuit's decision focused exclusively on whether the placement *situs* decision had to be made at the IEP meeting, the statutory scheme makes allowance for additional "meetings" and "members of a group" so long as parents are afforded the opportunity to be participants at such meetings **before** the placement selection decision is made. T.Y.'s parents, however, were not accorded any such protections by respondent. Respondent utterly failed to provide such safeguards.

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[9] *See also* 20 U.S.C. § 1414(e) ("Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child").

[10] The record in the case at bar is devoid of any such scenario. T.Y.'s parents attended the IEP meeting and were ready, willing and able to discuss the placement issue.

The Second Circuit failed to distinguish this Court's decision in *Winkelman*. This Court recognized numerous **parental** rights, including that "parents ... are members of any group that makes decisions on the educational placement of their child." *Winkelman*, 550 U.S. at 524 (quoting 20 U.S.C. § 1414(c)). Instead, the Second Circuit embraced the highly distinguishable decision in *White*. *See* 343 F.3d at 376.

Notably, in *White*, and in stark contrast to what happened in T.Y.'s situation, the placement *situs* issue was apparently discussed *ad nauseum* at the student's IEP meeting. *See id.* However, no such discussion ever took place at T.Y.'s IEP meeting because, in New York City as a matter of custom and practice, placement site selection apparently does not occur at the IEP meeting. *See* App. to Pet. Cert. 117. Nor does it occur even after the IEP meeting. Respondent simply mails out a piece of paper telling the student's parents what school site location respondent has unilaterally selected. *See* App. to Pet. Cert. 127.

The Second Circuit ignored or contravened the applicable controlling safeguards, in holding that "'educational placement' refers only to the general educational **program** – such as classes, individualized attention, and additional services a child will receive – rather than the "bricks and mortar" of the specific school." *See* App. to Pet. Cert. 11 (emphasis added).

The Second Circuit correctly held that if there were any material **procedural** safeguard violations, the court's next inquiry would be to assess the "Prong II" appropriateness of T.Y.'s unilateral placement at the Rebecca School. *See Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105 (2d Cir. 2007); *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006), *cert. denied*, 552 U.S. 985 (2007). The Second Circuit never addressed Prong II of the *Burlington/Carter* test, based upon its core finding that respondent did nothing wrong with respect to Prong I.

Based on this Court's consideration of the applicable statutory protections, this Court's controlling "ordinary meaning" rule of interpretation and the two conflicts that now exist in the circuits, this Court should grant petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2010

APPENDIX

08-3527-cv
T.Y. v. New York City Department of Education

UNITED STATES COURT OF APPEALS
FILED
OCT -9 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Argued: June 22, 2009 Decided: October 9, 2009)

Docket No. 08-3527-cv

T.Y., K.Y., ON BEHALF OF T.Y.,

Plaintiffs-Appellants,

— v.—

NEW YORK CITY DEPARTMENT
OF EDUCATION, REGION 4,

Defendant-Appellee.

Before: B.D. PARKER, WESLEY, *Circuit Judges*, CEDARBAUM, *District Judge*.*

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* The Honorable Miriam Goldman Cedarbaum, of the United States District Court for the Southern District of New York, sitting by designation.

Plaintiffs-Appellants T.Y. and K.Y., on behalf of their son, T.Y., appeal from an order of the United States District Court for the Eastern District of New York (Johnson, *J.*) granting summary judgment to Defendant-Appellee New York City Department of Education, Region 4. The parents seek tuition reimbursement under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400-1482 ("IDEA" or "IDEIA"). We hold that because the IDEA does not require that an Individualized Education Plan ("IEP") name a specific school placement, T.Y's IEP was not procedurally deficient. Furthermore, applying our deferential standard of review in IDEA cases, we conclude that T.Y.'s IEP did not substantively violate the IDEA.

AFFIRMED.

GARY S. MAYERSON (Tracy Spencer Walsh, *on the brief*), Mayerson & Associates, New York, New York, *for* Plaintiffs-Appellants.

SUZANNE K. COLT, Assistant Corporation Counsel (Pamela Seider Dolgow, Andrew J. Rauchberg, Karyn R. Thompson, of Counsel, *on the brief*), *for* Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York, *for* Defendant-Appellee.

BARRINGTON D. PARKER, *Circuit Judge*:

T.Y. is a child with autism. His parents sued the New York City Department of Education ("NYCDOE") on his behalf seeking reimbursement for T.Y's private school tuition under the Individuals with Disabilities Education Improvement Act, 20

U.S.C. §§ 1400-1482 ("IDEA" or "IDEIA"). The United States District Court for the Eastern District of New York (Johnson, *J.*) granted summary judgment to the NYCDOE, and the parents now appeal.

We affirm.

BACKGROUND

T.Y., like all children with a disability, is entitled to a free and appropriate public education under the IDEA. *See* 20 U.S.C. § 1400(d)(1)(A). As we have previously stated, "[t]he centerpiece of the IDEA's education delivery system is the individualized education program, or 'IEP.'" *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d 77, 81 (2d Cir. 2005) (internal quotation marks omitted). "The IEP, the result of collaborations between parents, educators, and representatives of the school district, sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Id.* (internal quotation marks omitted). If a disabled child's parents are dissatisfied with the IEP, as here, they may file a complaint with the state educational agency. There, the complaint will be heard by an impartial hearing officer ("IHO"), 20 U.S.C. § 1415(f), whose decision may be appealed to a state review officer ("SRO"), § 1415(g). The child's parents can, in turn, appeal this decision to a federal or state court. *See* § 1415(i)(2)(A).

T.Y., who has significant developmental delays and a severe language disorder as a result of his autism, began receiving early intervention services

when he was one and a half years old, and in the 2005-2006 school year, he was placed in a special education class. On May 10, 2006, T.Y.'s Committee on Special Education ("CSE") met to form T.Y's IEP for the 2006-2007 school year ("May IEP"). The CSE included T.Y.'s parents, as well as a district representative, a special education teacher, a school psychologist and an Applied Behavioral Analysis teacher. The IEP recommended that T.Y. be placed in a special class with a 6:1:1 staffing ratio, and advised that he receive three 30-minute sessions per week of individualized speech and language therapy, two 30-minute sessions per week of individualized occupational therapy, and two 30- minute sessions of individualized physical therapy per week. The IEP recognized that T.Y. sometimes responded to frustration by crying, biting his hand and pulling his hair, and recommended that these issues be managed through "modeling, reinforcement, [and] prompting of appropriate classroom behaviors." Partially to address these behaviors, the IEP also provided for "a full-time 1:1 crisis management paraprofessional."

Although T.Y.'s May IEP stated that T.Y.'s school would be in District 75, a group of schools that specialize in providing education for children with disabilities, it did not name the school that T.Y. would attend. Rather, on June 9, 2006, approximately a month after the IEP was formalized, the parents received a notice in the mail that recommended a specific school placement. T.Y.'s father visited the site and found it unsuitable for T.Y. for various reasons, including the staff's alleged rudeness and the lack of a gym or occupational therapy room. The NYCDOE offered the parents another school, which T.Y.'s parents called, but also

found to be unsuitable. Subsequently, the parents enrolled T.Y. in the Rebecca School, a specialized private school for autistic children, and notified the NYCDOE of their intent to seek reimbursement.

T.Y.'s parents requested an impartial hearing for reimbursement. They raised numerous substantive and procedural objections to T.Y.'s May 2006 IEP, contending, *inter alia*, (1) the IEP materially violated T.Y.'s right to a free and appropriate education, in part because the IEP did not provide T.Y. with adequate speech services and the IEP failed to provide sufficient parent training to the parents, and (2) the IEP was procedurally deficient because it did not include a specific school placement.

The IHO conducted a lengthy hearing. In addition to submitting evidence from private evaluators, the parents testified at the hearing, along with the Program Director at the Rebecca School and various professionals who had worked with T.Y. both in school and at home. In support of their claims, the parents also submitted T.Y.'s previous IEP, which was prepared in March of 2006 ("March IEP"), just two months before the May IEP. The March IEP provided T.Y. with substantially more speech and language skill services than the May IEP, and the March IEP named a specific school placement. An administrator from the NYCDOE, Kenneth Stark, also testified.

The IHO denied most of the parents' claims. The IHO rejected the parents' argument that the IEP was procedurally deficient because it failed to name a specific school placement, explaining that T.Y.'s CSE had "identified a type of program, and then the parent was given the opportunity to see suggested

sites," such that the IHO could not "see how the parents were harmed by the failure to identify a site at the CSE meeting." The IHO did, however, agree with the parents that the IEP did not effectively meet T.Y.'s speech and language needs, and ordered that the IEP include an additional three hours of speech and language therapy per week. However, the IHO determined that this deficiency alone did not establish that "the overall program recommended by the CSE was inappropriate, except to the extent that outside speech and language services were not offered in addition to those offered in school."

On appeal, the SRO largely agreed with the IHO's findings and conclusions, but reversed on one point, concluding that parent counseling and training should have been specifically named in T.Y.'s IEP.

T.Y.'s parents subsequently filed suit in the United States District Court for the Eastern District of New York, seeking review of the administrative determinations. The district court, after considering the NYCDOE's Rule 56.1 statement, and deferring to the findings and conclusions of the IHO and SRO, granted summary judgment to the NYCDOE.

DISCUSSION

Our standard for reviewing a state's administrative decisions in IDEA cases is, by now, well established. We have frequently explained that "the role of the federal courts in reviewing state educational decisions under the IDEA is circumscribed." *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007) (internal quotation marks omitted). "While the district court must base its decision on the preponderance of the evidence, it must give due weight to the

administrative proceedings, mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *A.C. ex rel. M.C. v. Bd. of Educ.*, 553 F.3d 165, 171 (2d Cir. 2009) (internal quotation marks, alterations and internal citations omitted). Therefore, as the Supreme Court has concluded, courts may not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

We undertake a three-step process to determine whether parents are entitled to tuition reimbursement. *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 192 (2d Cir. 2005). First, we consider whether the school district has complied with the IDEA's procedural requirements. *Id.* Next, we ask whether the IEP is "reasonably calculated to enable the child to receive educational benefits." *Id.* (internal quotation marks omitted). If the answer to either of these questions is "no," we then ask whether "the private schooling obtained by the parents is appropriate to the child's needs." *Id.*

I. Rule 56.1 Statements in IDEA Cases

We have not squarely faced the role, if any, that Rule 56.1 statements play when courts review IDEA cases. Local Rule 56.1 was adopted to aid the courts in deciding summary judgment motions by quickly identifying disputed material facts. The Rule requires that any motion for summary judgment be accompanied by a list of the "material facts as to which the moving party contends there is no genuine issue to be tried." Local Civil Rule 56.1(a). The requirement is strict; failure to submit a Rule 56.1

statement with a motion for summary judgment may result in the motion's denial. *Id.* Should the nonmoving party wish to contest the assertions contained within a Rule 56.1 statement, the nonmoving party must respond to each of the statement's paragraphs and include, if necessary, a statement of the additional material facts that demonstrate a genuine issue for trial. Local Civil Rule 56.1(b). A nonmoving party's failure to respond to a Rule 56.1 statement permits the court to conclude that the facts asserted in the statement are uncontested and admissible. *Gubitosi v. Kapica*, 154 F.3d 30, 31 n.1 (2d Cir. 1998). In the typical case, failure to respond results in a grant of summary judgment once the court assures itself that Rule 56's other requirements have been met. *See, e.g., Millus v. D'Angelo*, 224 F.3d 137, 138 (2d Cir. 2000).

A summary judgment approach to IDEA cases, however, is different. Instead of dispute resolution, a motion for summary judgment can serve as an aid to the court within a statutory scheme whose purpose is to ensure that children with disabilities receive the educational benefits to which they are entitled. *See Lillbask*, 397 F.3d at 83 n.3. The court's inquiry is twofold: first, it reviews the state's compliance with IDEA procedures and, second, the court determines if the IEP created through those procedures was "reasonably calculated to enable the child to receive educational benefits." *Id.* Though the court must show deference to administrative board findings, the court is also empowered to conduct an independent review of the record as a whole and even hear additional evidence. 20 U.S.C. § 1415(i)(2)(C); *Rowley*, 458 U.S. at 206; *Cerra*, 427 F.3d at 191-92. The court's inquiry is a results-based standard in many respects, concerned more with a just outcome

for a disabled student than with judicial efficiency. *See Rowley*, 458 U.S. at 206-07. A Rule 56.1 statement, while not required, may assist the court's inquiry into whether IDEA procedures were followed and whether the result was reasonably designed to confer educational benefits. But while a Rule 56.1 statement may assist the court in reviewing particular issues, it is not in and of itself dispositive. The district court's characterization of Appellee's Rule 56.1 statement as "necessary" was therefore not entirely correct. The court's error was of no consequence, however, because we are satisfied that the court conducted an independent review and carefully reviewed the record, as is required by the statute.

II. Substantive Violations

The parents argue that the hearing officers erred in not finding that the IEP substantively deprived T.Y. of a free and appropriate education, notwithstanding the officers' conclusions that the IEP was deficient in speech and language services and parent training. In addition, the parents argue that the NYCDOE's failure to provide for a Functional Behavioral Assessment ("FBA") or Behavior Intervention Plan ("BIP") to address T.Y.'s biting, hair pulling and other behaviors amounted to a substantive violation of the IDEA.

As we have noted on several occasions, "[b]ecause administrative agencies have special expertise in making judgments concerning student progress, deference is particularly important when assessing an IEP's substantive adequacy." *Cerra*, 427 F.3d at 195. Indeed, we have reversed a district court's findings where we determined that "the District

Court impermissibly chose between the views of conflicting experts on a controversial issue of educational policy . . . in direct contradiction of the opinions of state administrative officers who had heard the same evidence." *Id.* (citing *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 383 (2d Cir. 2003)).

Under this standard of review, we agree with the NYCDOE that the administrative officers' opinions, which were thorough and well-reasoned, deserve deference. While the parents argue that a crisis paraprofessional is no substitute for an FBA or a BIP, there is substantial evidence in the record that the 1:1 aide provided significant benefits to T.Y. in addressing the problematic behaviors. We agree that the record does indicate that the initial IEP lacked the requisite speech and language services and parent training, but conclude that these errors were suitably corrected by the IHO and SRO, and do not render the IEP as a whole substantively deficient. In short, we see no reason to second guess the reasonable, professional determinations of the IHO and SRO in this case.

III. Procedural Violations

Finally, the parents argue that the NYCDOE's policy of not specifying a particular school in the IEP deprived them of their right to meaningful participation in the IEP's development. At the hearing before the IHO, Kenneth Stark, a representative from the NYCDOE, testified that in New York a specific school placement is never offered at the IEP meeting, and that the child's placement is rather determined by "a citywide placement officer

who looks at which school would be the most appropriate."

The parents point to various implementing regulations of the IDEA, which provide, in part, that "the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to . . . [t]he identification, evaluation, and educational *placement* of the child." 34 C.F.R. § 300.501(b)(1)(i) (emphasis added). The parents also direct our attention to 20 U.S.C. § 1414 (d)(1)(A), which defines "individualized education program" as a statement that includes, *inter alia*, "the anticipated frequency, *location*, and duration of those services." § 1414(d)(1)(A)(i)(VII) (emphasis added). Given this language, the parents argue that "[t]he procedural safeguards of the federal IDEIA statute thus make clear that parents are to be afforded meaningful participation in the decision-making process as to the location and placement of their child's school and classroom."

While the parents' citation of the statute and regulations is, at first glance, compelling, upon closer evaluation we conclude that this language does not compel the result the parents seek. As we have previously stated, the term "educational placement" in the regulations "refers only to the general type of educational program in which the child is placed." *Concerned Parents v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir. 1980). "Educational placement" refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the "bricks and mortar" of the specific school.

Further, the requirement that an IEP specify the "location" does not mean that the IEP must specify a specific school site. The United States Department of Education ("USDOE") expressly considered this question in its commentary to the 1997 amendments to the IDEA. In that commentary, the USDOE noted,

> Some commenters requested that the term "location" be defined as the placement on the continuum and not the exact building where the IEP service is to be provided . . . . Other commenters similarly stated that a note be added clarifying that "location" means the general setting in which the services will be provided, and not a particular school or facility.

Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12406, 12594 (Mar. 12, 1999). In resolving this issue, the USDOE concluded that "[t]he location of services in the context of an IEP generally refers to the type of environment that is the appropriate place for provision of the service. For example, is the related service to be provided in the child's regular classroom or resource room?" *Id.*

This conclusion comports with the Senate's commentary, which states that "[t]he location where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child." S. Rep. No. 105-17, at 21 (1977). "For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational

program." *Id.* "For this reason," the commentary continues, "in the bill the committee has added 'location' to the provision in the IEP that includes 'the projected date for the beginning of services and modifications, and the anticipated frequency, location, and duration of those services.'" *Id.* (emphasis omitted). We interpret these statements to indicate that the term "location" does not mean the specific school location, but the general environment of the overall program.

Therefore, we conclude that because there is no requirement in the IDEA that the IEP name a specific school location, T.Y.'s IEP was not procedurally deficient for that reason. We emphasize that we are not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. We simply hold that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA. *See White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 379 (5th Cir. 2003). *But see A.K. ex rel J.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007).

We note, however, that notwithstanding our holding here, the evidence reflects that T.Y.'s parents *did* participate in school selection and that the NYCDOE worked cooperatively with the parents after they voiced their objections. The NYCDOE offered the parents one school, which they rejected. The NYCDOE offered the parents another school, which they also rejected without an on-site visit. The parents then enrolled their child into the Rebecca School without allowing the NYCDOE an opportunity to offer yet another school. The parents' actions suggest that they seek a "veto" over school

choice, rather than "input"—a power the IDEA clearly does not grant them. *See White*, 343 F.3d at 380.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

K.Y. and T.Y. on behalf of T.Y.,

Plaintiff,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION,

Defendant.

07 CV 3199 (SJ) (KAM)

MEMORANDUM AND ORDER

APPEARANCES:

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JOHNSON, Senior District Judge:

Plaintiffs brought this action, pursuant to the Individuals with Disabilities Education Act ("IDEA"), codified at 20 U.S.C. § 1400 *et seq.*, and various other federal and state regulations, alleging that Defendant New York City Department of Education ("DOE") failed to provide their son, who is autistic, with a free and appropriate public education, as

required under the statute. Presently before the Court is Defendant's cross-motion for summary judgment, as well as Plaintiffs' request for modified *de novo* review of the administrative decisions handed down by an Impartial Hearing Officer ("IHO") and the New York Department of Education State Review Office ("SRO"), respectively, each of whom ruled in favor of Defendant. As it pertains to relief, Plaintiffs seek reimbursement for expenses they incurred as a result of enrolling their son in a private school after the DOE's alleged failure to provide the kinds of school-based programs and services that their child requires. For the reasons stated herein, this Court affirms the decisions of the IHO and SRO, holding that the DOE's proposed educational plan satisfied the "free and appropriate public education" standard and denying Plaintiffs reimbursement for the cost of private school tuition. In addition, Defendant's cross-motion for summary judgment is hereby GRANTED.

BACKGROUND

On May 10, 2006, in preparation for the 2006-2007 school year, the Committee on Special Education ("CSE") met to discuss and develop an individual education program ("IEP") for T.Y., who has been diagnosed with autism and presents with "significant cognitive, language and developmental delays." Def. Rule 56.1 Statement, ¶ 1. The CSE was comprised of various members of the "IEP team," as that term is understood in the context of the IDEA, including Plaintiffs (T.Y.'s parents), a special education teacher, a district representative, a school psychologist, and an Applied Behavioral Analysis teacher. Id. at ¶ 4; 20 U.S.C. § 1414 (d)(1)(B). Because all the parties were in agreement that, given the

severity of T.Y.'s condition, it would not be appropriate for him to be placed in a regular education environment, no general education teacher was present at the IEP meeting. Def. Rule 56.1 Statement, ¶ 5; Transcript of Impartial Hearing, dated 11/14 and 11/28, 2008 ("Transcript") at 145; 20 U.S.C. § 1414 (d)(1)(B)(ii).

It is undisputed that, during the course of the IEP meeting, the CSE considered a number of factors in its attempt to fashion an appropriate and educationally beneficial program for T.Y., including "his language skills, impairments and deficiencies, his social and emotional skills, his physical development, and the state of his adaptive living skills." Def. Rule 56.1 Statement, ¶ 6. In addition, the CSE took into account the student's prior negative behaviors in formulating the program, apparently recognizing that such behavior, left unaddressed, could diminish T.Y.'s ability to engage in essential classroom activities. Id. at ¶ 7. The CSE also set a range of detailed annual goals and short term objectives, in an effort to track T.Y.'s progress throughout the year. Id.

Based on all of the above-mentioned considerations, the CSE made a number of recommendations, including: 1) that T.Y. be placed in a special class in a specialized school with a staffing ratio of 6:1:1[1]; 2) that the normal school year be extended through an entire calendar year for T.Y.'s benefit; 3) that a full-time, in-class, crisis management paraprofessional be assigned to work with T.Y. on an individual basis; and 4) that T.Y.

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[1] This ratio refers to the number of students (6) per teacher (1) and paraprofessional/teacher's aide (1).

receive a number of related, school-based services such as speech, language, occupational, and physical therapy, two to three times each week. Id. at ¶ 9. In addition, T.Y.'s program would have included counseling and training for his parents, as is required with any placement for an autistic student. Id.

Following the IEP meeting, the DOE recommended that T.Y. be placed at P.S. 255Q, located on the campus of P.S. 16Q. Id. at ¶ 10. After that suggestion was rejected by Plaintiffs[2], the DOE recommended P.S. 75Q as an alternative. Id. at ¶ 11. That placement option was also rejected by Plaintiff. Id. Then, in early July 2006, rather than working with the DOE to identify another potential public school placement, Plaintiffs made a unilateral decision to enroll their son at the Rebecca School ("Rebecca"), a local private school with an annual tuition of $72,000. Id. at ¶ 12; see Pl. Reply Mem. in Further Support of Motion ("Pl. Rep. Mem."), p. 7.

During the 2006-2007 school year, while attending Rebecca, T.Y. was placed in a class with a 6:1:3 staffing ratio, and received speech, language and occupational therapy. However, Plaintiffs do not dispute the fact that, despite the programming offered through Rebecca, they had to seek out private entities to provide T.Y. with supplemental services, including additional speech and language therapy

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[2] Counsel for Plaintiff states that, upon visiting the school initially suggested by the CSE, T.Y.'s mother found it to be "totally inappropriate for [her] son," noting that the school lacked a gym for recreation, that it did not have an appropriate space in which to conduct occupational therapy sessions, and that the staff members with whom she interacted and observed were "rude and inattentive." Pl. Mem. in Support, p. 6-7.

and Applied Behavior Analysis services. Def. Rule 56.1 Statement, ¶ 14; Transcript at 38, 46, 54, 75, 215, and 237.

On or about September 5, 2006, Plaintiffs requested a hearing before the Impartial Hearing Officer seeking "prospective, declaratory, compensatory and remedial relief," including reimbursement for the cost of tuition at the Rebecca School for the 2006-2007 school year and the additional out-of-school services that were not provided by the Rebecca School. Pl. Demand for Impartial Hearing, dated September 5, 2006, at p. 2.

After considering the merits of the Plaintiffs' claim, including testimony from at least nine different witnesses and more than 30 separate exhibits, the IHO determined that, although the evidence showed that the IEP should have included three additional hours of speech and language therapy after school (which the DOE was ordered to fund), Plaintiffs failed to demonstrate that the overall program developed and recommended by the DOE deprived the student of a free and appropriate public education. Hearing Officer's Findings of Fact and Decision, dated December 28, 2006 ("IHO Decision") at 16. The IHO also rejected Plaintiffs' assertion that the alternative placement, the Rebecca School, provided T.Y. with an educational program that meets the IDEA standards. Id. First, the IHO noted that the Rebecca School plan, like the one created by the DOE, lacked a sufficient amount of speech and language therapy, and that "[i]t would be illogical to find that the recommendation of the CSE was inappropriate and then find that the unilateral placement was appropriate if it was lacking precisely the same service." Id. The IHO

found that the Rebecca School plan was further deficient in that, in contrast to the DOE plan, it did not "offer the ABA services which the evaluations and the parents' witnesses testified [the student] needs." Id.

In a decision dated April 2, 2007, the SRO upheld the IHO's findings, pointing out that T.Y.'s IEP:

> . . . properly described his needs, accurately reported his present levels of performance, set out goals in all appropriate areas of need, included appropriate short-term instructional objectives for each goal as a part of his alternate assessment program, recommended an appropriate placement for kindergarten, recommended appropriate strategies and a full-time paraprofessional to address his behavior, and provided related services in appropriate areas. State Review Officer Decision, dated 4/2/07 ("SRO Decision"), at 12.

Notably, the SRO also stated that the IEP should have included language explicitly providing for parent training and counseling for Plaintiffs, as required for all programs designed for children classified with autism, although that omission "did not rise to the level of a denial of [a free and appropriate public education]." Id. at 12-13.

JURISDICTION AND VENUE

This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367. Venue is proper given that all parties to this action reside or are located in this judicial district.

STANDARD OF REVIEW

IDEA Violations

When reviewing an administrative decision under the IDEA, federal district courts shall receive the records of the administrative proceedings, hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, grant such relief as it determines appropriate. 20 U.S.C. § 1415(i)(2)(B). Although the decisions of administrative hearing officers are subject to "independent" review by the district court, "due weight" must be given to the findings of fact made by the hearing officer. Walczak v. Florida Union Free School District, 142 F.3d 119, 129 (2d Cir. 1998). Moreover, the district court must remain "mindful that the judiciary generally 'lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.'" Id. The United States Supreme Court has cautioned that the district court's independent review of the administrative proceedings in IDEA cases "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review." Board of Ed. v. Rowley, 458 U.S. 176, 205, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1982). "Deference is particularly appropriate when, as here, the state hearing officers' review has been thorough and careful." Walczak, 142 F.3d at 129.

With respect to determining the adequacy of an IEP for a child with a disability, the Court looks to the relevant federal and state statutes and regulations, which indicate that the IEP must

include, *inter alia*: 1) the student's present levels of academic achievement and functional performance; 2) the student's disability classification; 3) measurable annual goals consistent with the student's needs and abilities; 4) short-term instructional objectives and benchmarks that serve as measurable intermediate steps between the student's present level of performance and the annual goals; 5) the specific special education program and services that will be provided; 6) an explanation of the extent, if any, to which the child will not participate with nondisabled children in regular class; 7) the start date, frequency, and duration of the recommended services; and 8) a statement indicating the reasons that the student will participate in alternate state and district-wide assessments of student achievement, if applicable. See 20 U.S.C. § 1414(d)(1)(A); 8 N.Y.C.R.R. § 200.4(d)(2). In addition, as was noted by the IHO and the SRO, New York law requires that any program developed for autistic students must include training and counseling for the parents in order to enable them "to perform appropriate follow-up intervention activities at home." 8 N.Y.C.R.R. § 200.13(d).

As it relates to a party's request for reimbursement for the cost of tuition at an alternative placement selected by the parents, the district court is charged with evaluating the extent to which the DOE has satisfied the three-part inquiry set forth in School Comm. of Burlington, Mass. v. Dept. of Ed. of Mass., 736 F.2d 773, 791 (1st Cir. 1984) and Florence County School Dist. Four v. Carter, 510 U.S. 7 (1993). A state board of education may be required to reimburse parents for the cost of an alternative educational program only if: 1) the educational program recommended by the board is

deemed to be inappropriate under the law; 2) the program selected by the parent was appropriate in that it met the student's special education needs; and 3) the equities support the parent's claim. Burlington, 471 U.S. 359; Carter, 510 U.S. at 12-13.

Summary Judgment

It is well-settled that a party moving for summary judgment has the burden of establishing that there exists no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Ford v. Reynolds, 316 F.3d 351, 354 (2d Cir. 2003). Material facts are those that may affect the outcome of the case. See Anderson, 477 U.S. at 248. An issue of fact is considered "genuine" when a reasonable finder of fact could render a verdict in favor of the non-moving party. Id. When considering a motion for summary judgment, the Court must view the evidence, as well as any inferences that may be drawn from such evidence, in the light most favorable to the non-moving party. See Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998).

If the moving party discharges its burden of proof under Rule 56(c), the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party opposing a properly supported motion for summary judgment "may not rest upon mere allegations or denials of his pleading." Anderson, 477 U.S. at 256. Indeed, "the mere existence of some alleged factual dispute between the parties" alone will not defeat a properly supported motion for summary judgment. Id. at 247-48. Rather, enough

evidence must favor the non-moving party's case such that a jury could return a verdict in its favor. Id. at 248.

In considering a summary judgment motion, "the court's responsibility is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986) (citing Anderson, 477 U.S. at 248). If the Court recognizes any material issues of fact, summary judgment is improper, and the motion must be denied. See Eastway Const. Corp. v. City of N.Y., 762 F.2d 243, 249 (2d Cir. 1985).

DISCUSSION

The undisputed facts surrounding this case make it clear that summary judgment is, indeed, appropriate in this instance. First, as explained above, this Court gives deference to the decisions rendered by the DOE administrative hearing officers, not only because of their familiarity with the facts of this case, but also due to their extensive experience in the field of education generally, and with respect to special education in particular.

Moreover, this Court notes that a review of the decisions by the SRO and the IHO suggest that both gave thorough and careful consideration to the issues involved in this case, thus making deference that much more appropriate here. The IHO's 20-page opinion includes detailed information and findings of fact regarding the child's condition (and learning disabilities in connection therewith), previous evaluations and progress reports developed by school officials, and DOE recommendations regarding the

most appropriate ways to address the student's educational needs. The IHO also considered over 30 exhibits, in addition to witness testimony, including that of the Plaintiffs, over the course of a three-day administrative hearing.

The SRO then issued a 17-page opinion, also extraordinary in its level of detail, which included an extensive review of the facts, circumstances, and documentary evidence surrounding the case, and a clear articulation of the rationale behind upholding the IHO's findings. Further demonstrating the level of care with which this matter was handled, the SRO did sustain the appeal in part, finding that the parent counseling and training component of T.Y.'s educational program should have been identified explicitly on the child's IEP. SRO Decision at 12-13. Ultimately, however, the SRO determined that, in light of all the circumstances and the content of T.Y.'s IEP, the child was not deprived of a free and appropriate public education under the first prong of the Burlington/Carter test.

However, notwithstanding the decisions of the administrative hearing officers, this Court's independent review of the case leads to the same conclusion. Specifically, the Court finds that Plaintiffs' assertion that the educational plan developed by local school officials, as presented in T.Y.'s IEP, deprives the child of a free and appropriate public education is utterly unsupported by the evidence and the undisputed facts of the case. Based on Defendant's Rule 56.1 Statement, the

content of which was not challenged by Plaintiffs[3], school officials made every effort, as required under

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[3] In their Reply Memorandum in Further Support of their Motion for Modified *De Novo* Review, Plaintiffs balk at the fact that Defendant filed a Rule 56.1 Statement of Undisputed Facts with the Court, stating that "defendant-appellee has not cited to any authority, controlling or otherwise, holding that such a statement is required, or even appropriate, for an IDEIA (sic) modified *de novo* appeal." Pl. Reply Memo, at 1. Plaintiffs further argue, incorrectly, that "[n]o such requirement exists," and that "defendant-appellee may have *intentionally* bulked up the record with an unhelpful and wholly *unnecessary* Rule 56.1 Statement to present a mountain of paper that might tend to convince this Court that it would be too much trouble to reverse." (emphasis in original) Id. at 1-2. In fact, any appropriately filed Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, must be accompanied by a short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. See Rule 56.1(a) of the United States District Court Local Civil Rules for the Southern & Eastern District of New York ("Local Civil Rules"). Indeed, "[f]ailure to submit such a statement may constitute grounds for denial of the motion. Id. Moreover, Rule 56.1 directs that any opposition to a Rule 56.1 Statement must include responses to each of the numbered paragraphs in the moving party's submission and, if necessary, a short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried. See Local Civil Rule 56.1(b). Furthermore, not only is Defendant's Rule 56.1 Statement necessary, it goes to the heart of the Court's determination of whether or not summary judgment is appropriate in a given case (i.e. whether or not there exist any genuine issues of material fact to be tried). Hence, it is difficult to comprehend Plaintiffs' declaration that they "do not intend to address, point by point, defendant-appellee's Rule 56.1 Statement to go through the pointless and moot exercise of proving whether or not there are any issues of fact remaining for trial." Pl. Reply Memo, at 2. But since Plaintiff has not challenged any of the assertions made by the Defendant in the Rule 56.1 Statement, this Court will assume that the facts stated therein are undisputed.

the law, to fashion a plan that provided the child with the tools and support necessary to create an educational environment that would enable him to succeed.

It is worth noting that, according to the SRO's findings, the CSE discussed a number of alternative educational programs for T.Y. before the current plan was ultimately developed, including a special class in a community school district with a 12:1+1 staffing ratio and a residential placement, each of which were determined to be inappropriate given T.Y.'s particular circumstances. See SRO Decision at 14. Hence, Plaintiffs' claim that the plan was the result of "impermissible predetermination" is contradicted by their own account of the events surrounding the creation of the IEP.

Plaintiffs' predetermination argument is further weakened by the fact that, as noted above, the IEP includes detailed information about the child, his condition and educational needs, and the steps that should be taken to address those needs. For example, the plan included regular access to physical, occupational, and speech/language therapy, in an effort to address T.Y.'s significant deficiencies with respect to his oral motor skills, physical abilities, and cognitive, social, and emotional delays. In addition, the plan requires that a full-time crisis management paraprofessional remain with T.Y. throughout the school day in order to help minimize the kinds of behavioral issues that have impeded the child's progress in the past. DOE's Rule 56.1 Statement at ¶¶ 8-9. Hence, in addition to further demonstrating the unique nature of T.Y.'s plan, Plaintiffs' claim that the IEP is inadequate because it does not include a Functional Behavior Assessment ("FBA")

or Behavior Intervention Plan ("BIP") is belied by the plan's inclusion of a fulltime paraprofessional equipped to handle behavior problems that may arise during the course of the school day. The administrative hearing officers obviously considered these measures to be sufficient in light of all the circumstances and despite the absence of an FBA or BIP.

The plan also calls for a 6:1:1 ratio, which would have allowed T.Y. to receive more individualized attention than he would receive in a regular education environment. The content of the IEP also was clearly influenced by T.Y.'s prior educational experiences. It appears that information and recommendations related to his progress up to the point at which the most recent IEP was created on May 10, 2006, as well as his areas of need, significantly informed the development of the IEP, in addition to the goals and benchmarks against which T.Y.'s future progress would have been measured during the 2006-2007 school year.

It also should be pointed out that, despite Plaintiffs' argument to the contrary, the child's parents were appropriately involved in the development of the IEP. Indeed, Plaintiffs do not dispute the fact that they were present for the meeting during which the plan was being formulated and had an opportunity to voice any opinions, concerns, or preferences at that time. Plaintiffs' assertion that they were not in attendance when T.Y.'s actual *placement* was chosen is without merit. Whatever facility was ultimately chosen would have had to be consistent with the plan that was developed by the CSE, which, as noted above, included the child's parents. Moreover, school

officials did not make a unilateral decision even with respect to placement. Rather, they made two placement recommendations, each of which were rejected by Plaintiffs, after which Plaintiffs cut short the placement process in favor of placing their child at the Rebecca School.

Plaintiffs also argue that the CSE was incomplete. in violation of the IDEA, because there was no regular education teacher present at the IEP meeting. However, according to the record, the parties all agreed that, in light of the severity of T.Y.'s condition, a regular general education curriculum would not be appropriate under any circumstances. The language of the statute makes clear that at least one regular education teacher should participate in the meeting "if the child is, or may be, participating in the regular education environment." 20 U.S.C. § 1414(d)(1)(B)(ii).

Finally, this Court agrees with Plaintiffs, as did the SRO, that parent training and counseling should have been explicitly incorporated into the IEP as required by the statute. However, the Court also agrees with the SRO's finding that, despite this omission, the plan presented does not amount to a denial of a free and appropriate education. In addition, Defendant readily acknowledged the mistake and has indicated that parent training and counseling would have been provided to Plaintiffs had T.Y. been placed pursuant to the IEP.

The Court is convinced that, based on an independent review of the record and the undisputed facts, and according due weight to the decisions of the administrative hearing officers, Plaintiffs have failed to demonstrate that the plan developed by the

DOE would have deprived T.Y. of a free and appropriate public education, as they are required to show under the Burlington/Carter test. Since Plaintiffs cannot prevail without satisfying this element of the test, the Court declines to address whether or not the remaining parts of the inquiry have been satisfied. Moreover, based on the submissions of the parties, as well as the evidence presented at the administrative hearings, there are no genuine issues of material fact to be tried in this case.

CONCLUSION

For these reasons, the decision of the SRO, denying Plaintiffs' request for reimbursement is affirmed, and Defendant's motion for summary judgment is hereby GRANTED. This case is dismissed with prejudice.

SO ORDERED.

Dated: July 2, 2008
Brooklyn, New York

/s/ Hon. Sterling Johnson, Jr.
Senior U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

K.Y. and T.Y. on behalf of T.Y.,

Plaintiff,

-against-

JUDGMENT

NEW YORK CITY DEPARTMENT OF EDUCATION,

07-CV-3199 (SJ)

Defendant.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
JUL -2 2008
P.M. _____
TIME A.M. _____

A Memorandum and Order of Honorable Sterling Johnson Jr., United States District Judge, having been filed on July 2, 2008, affirming the decision of the State Review Office, denying plaintiffs' request for reimbursement; granting defendant's motion for summary judgment; and dismissing the case with prejudice; it is

ORDERED and ADJUDGED that plaintiff take nothing of the defendant; that the decision of the State Review Office, denying plaintiffs' request for reimbursement is affirmed; granting defendant's motion for summary judgment; and dismissing the case with prejudice.

Dated: Brooklyn, New York
July 02, 2008

Robert C. Heinemann
Clerk of Court

By: _____
Terry Vaughn
Chief Deputy of
Court Operations

THE UNIVERSITY OF THE STATE OF NEW YORK

The State Education Department
State Review Officer

No. 07-010

Application of a CHILD WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Mayerson & Associates, attorney for petitioners, Gary S. Mayerson, Esq., of counsel

Hon. Michael A. Cardozo, Corporation Counsel, attorney for respondent, Andrew J. Rauchberg, Esq., of counsel

DECISION

Petitioners appeal from the decision of an impartial hearing officer which denied their request for reimbursement of tuition payments to the Rebecca School and which also denied their requests for funding for supplementary home-based special education itinerant teacher (SEIT) services and after school speech-language therapy. The appeal must be sustained in part.

Petitioners' son was four years old and attending the Rebecca School at the time the impartial hearing commenced on November 28, 2006 (see Parent Ex. B at p. 1; Tr. pp. 181, 207). At the time of the impartial hearing respondent was providing the child with six

hours a week of home-based applied behavioral analysis (ABA) SEIT services (Tr. p. 39; Parent Ex. E at p. 1), and five hours a week of home-based speech-language services at a private agency (Tr. p. 128; Parent Ex. P at p. 1). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]). The child's eligibility for special education services as a student with autism (see 34 C.F.R. § 300.8[c][1];[1] 8 NYCRR 200.1[zz][1]) is not in dispute in this appeal.

The child has significant global developmental delays (Parent Ex. K at p. 5), characterized by a severe receptive and expressive language disorder that includes verbal apraxia, a motor disorder of speech, as well as oral motor deficits that include an open mouth posture and significant drooling (Parent Ex. Y at pp. 1-2). The child's ABA special education teacher testified at the impartial hearing that the child's functioning was similar to that of a two year old child (Tr. p. 243). He required prompting for all self-care "adaptive living skills" (ADL) and was not toilet trained (Tr. p. 239). The child's mother described him as non-verbal (Tr. pp. 102, 128, 132,

[1] The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, and unless otherwise specified, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

167, 175). The child's home-based special education teacher and speech-language pathologist reported that the child needed to have a functional system of communication (Tr. pp. 59, 79-80). The child's occupational therapist at the Rebecca School reported that the child had challenges with processing sensory information and tended to seek sensory input through his mouth and through touch (Parent Ex. DD at p. 1). The occupational therapist also indicated that the child demonstrated weakness in gross motor planning (id.). The occupational therapist noted that when upset, the child would cry and mouth his hand and/or seek to grab other people's hair and chew on it (Parent Ex. DD at p. 2). These behaviors were consistent with the child's mother's description of behaviors the child demonstrated at home (Tr. p. 113) and other evaluations in the record (see Parent Exs. O; N; L; K; I).

Petitioners' son reportedly began receiving early intervention services when he was two and one-half years old (Tr. p. 137). He was initially referred to respondent's Committee on Preschool Special Education (CPSE) due to petitioners' concerns regarding his speech-language, gross motor, social-emotional, and cognitive development (Parent Ex. E at p. 1). A July 27, 2005 individualized education program (IEP) (Parent Ex. GG) is the earliest IEP included in the record and resulted from a CPSE review on that date (see Parent Ex. GG at pp. 1, 2). At that meeting, the CPSE determined that petitioners' son was eligible to receive special education services as a preschool child with a disability (id.). The CPSE also recommended a 12-month program and placement for the 2005-06 school year, when the child would still be in pre-school, in

an 8:1+2 special class at the Marcus Avenue Early Childhood Development Program (Marcus) for five hours a day, five days a week (Parent Ex. GG at p. 1). The CPSE also recommended that the child's services be modified and that petitioners' son be provided with the related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT), all provided individually, three times a week for 30 minutes (Parent Ex. GG at pp. 1, 2, 17). The CPSE also recommended a 1:1 paraprofessional and added home-based SEIT services for ten hours a week (Parent Ex. GG at pp. 1, 2). The child's mother testified that the child did not receive the recommended SEIT services until January 17, 2006, at which time he began to receive six of the ten recommended hours a week (Tr. pp. 121, 125). On October 25, 2005, respondent issued a related service authorization (RSA) for the child to begin to receive home-based speech-language services, which were provided at a private agency, in addition to his educational program at Marcus (Tr. p. 168; Parent Ex. P at p. 1).

Respondent's CPSE convened on October 28, 2005 (see Parent Ex. FF). At petitioners' request (Tr. p. 121), the CPSE added home-based individual speech-language therapy three times a week for 60 minutes to the child's program. These services were provided by a private agency (Tr. pp. 167, 173; Parent Ex. FF at pp. 1-2, 17-19).

A January 11, 2006 educational update prepared by a special educator at Marcus (Parent Ex. L at pp. 1, 4) reported the results of an assessment of the child using the Hawaii Early Learning Profile: Birth to Three Years (HELP birth-3). The assessment identified delays of greater than 33 percent in all

areas of development including cognition, language, fine and gross motor, social, and self-help skills (Parent Ex. L at pp. 1-4). Specifically, social and language skills were each at the 18-month level (Parent Ex. L at pp. 2-3), cognitive skills were approximately at the 20 month level (Parent Ex. L at p. 2), and adaptive skills were at the 20-month level (Parent Ex. L at p. 3). Fine motor skills were at the 15-month level and although no age level was reported for gross motor skills (id.), an earlier PT update written by the physical therapist at Marcus dated December 14, 2005 reported that assessment results based on the Hawaii Early Learning Profile checklist (HELP checklist), in conjunction with therapeutic handling and clinical opinion, indicated that the child's gross motor skills were at the 24-25 month level, which represented a greater than 33 percent delay in the performance of gross motor skills (Parent Ex. O at p. 3). A December 19, 2005, OT annual review report also indicated assessment results based on the HELP checklist and yielded a developmental age score at the 25-month level for fine motor skills (Parent Ex. N at p. 2), which was a more mature developmental age level than indicated in the January 11, 2006 educational update.

A speech-language pathologist at Marcus conducted a speech-language update on December 21, 2005 (see Parent Ex. M). Administration of the Pre-School Language Scale-4 by the evaluator yielded standard scores of 50 (percentile rank of one) for both receptive language and expressive language (Parent Ex. M at pp. 1-2). The test scores were reported to be indicative of receptive and expressive language delays greater than 33 percent (id.). According to the evaluation report, in the area of receptive language skills the child demonstrated

ability to follow simple one-step directions when provided with verbal and gestural cues, to follow routines, to identify five to eight familiar items in a group and demonstrate appropriate use of some objects during play, to respond to his name, and to localize a sound source when the source was not in view (Parent Ex. M at p. 1). In the area of expressive language skills, the evaluation report described the child as communicating his wants and needs by pushing/pulling behaviors, gestures, and occasional vocalizations such as some consonant and consonant vowel (CV) sounds (id.). The update reported that if agitated he might cry, bite his own hand or pull hair (id.). It stated that if seeking attention from others, the child was noted to grab the person's hand and lead them to the desired item (id.). The update also noted oral motor weakness and weaknesses in pragmatic skills (Parent Ex. M at p. 2).

In preparation for a meeting of respondent's CPSE, the child's SEIT, who was then providing the child with six hours of ABA services at home, evaluated the child on March 7, 2006 and prepared an age-out report on March 9, 2006 (see Parent Ex. K). According to the evaluation, administration of the Developmental Assessment of Young Children (DAYC) yielded developmental age level scores of 18 months (65 percent delay) for cognitive development, 16 months (69 percent delay) for language development, 20 months (61 percent delay) for social-emotional development, 29 months (43 percent delay) for motor development, and 17 months (67 percent delay) for self-help skills (Parent Ex. K at pp. 1-3). The SEIT's evaluation also reported that at the time of the evaluation the child was functioning more than two years below age level (Parent Ex. K at p. 5). The SEIT recommended ongoing 1:1 special

education services in order for the child to function in his classroom and real-life setting, continuous prompting throughout the day, a 1:1 paraprofessional in school, special education support in the form of ABA, and continued speech-language therapy, OT, and PT (id.).

The CPSE reconvened on March 24, 2006 (see Parent Ex. C at p. 1). It recommended an increase of two hours a week in the child's home-based speech services for a total of five hours a week (Tr. pp. 125-26, 173; Parent Ex. C at pp. 2, 29). The record indicates that in May 2006 staffing problems resulted in a reduction of the child's after school speech-language services to two hours a week, and that these after school services then increased in July 2006 to four hours a week (Tr. pp. 126-27, 165-66, 173).

A March 28, 2006 speech-language progress report by speech-language pathologists from the agency that provided the child with home-based speech-language services (see Parent Ex. I) stated that at that time, the child presented with receptive and expressive language impairments and oral motor deficits secondary to autism (Parent Ex. I at p. 1). As it related to the child's receptive language skills, the report stated that the child had difficulty following directions and identifying items on request, but was beginning to follow one-step directions and identify body parts (Parent Ex. I at pp. 1-2). As it related to the child's expressive language skills, the report described the child as lacking a mode of functional communication, except for the use of some basic signs to request food and toys (Parent Ex. I at p. 1). Consistent with the December 21, 2005 speech-language update prepared by a speech-language

pathologist at Marcus (see Parent Ex. M), the progress report stated that the child's oral motor deficits were characterized by an open mouth posture and decreased control of oral secretions resulting in significant drooling (Parent Ex. I at p. 1; Parent Ex. M at p. 1). The progress report also noted the child's poor range of motion of the articulators used for speech production and that this affected his speech production ability (Parent Ex. I at p. 1). The progress report also advised that the use of PROMPT, a tactile kinesthetic approach that provides proprioceptive input to the oral musculature that aids with the needed "mapping" for the movements of the articulators during speech sound production, facilitated improvement in the child's articulation of basic consonant-vowel-consonant-vowel (CVCV) combinations (Parent Ex. I at pp. 1-2). Based on the child's receptive, expressive, and oral motor impairments, the speech-language pathologists recommended an increase in the child's home-based speech-language services from three individual 60-minute sessions a week to five such sessions a week (Parent Ex. I at p. 2).

On March 30, 2006, the child's special education teacher at Marcus prepared a statement for respondent requesting that petitioners' son continue to have access to a one-to-one (1:1) aide during the 2006-07 school year (Parent Ex. J). The report indicated that the 1:1 aide had been providing the child with significant and important benefits and that he required such a service to assist him during the 2006-07 school year (id.).

On May 10, 2006, respondent's Committee on Special Education (CSE) convened to develop the child's IEP for the 2006-07 school year when he

would be in kindergarten (Parent Ex. B at p. 1). The CSE recommended 12-month services in a special 6:1+1 class in a specialized school in District 75 (Parent Ex. B at p. 2) due to the child's "extreme cognitive and language delays" and his tendency to exhibit self-injurious behaviors and aggression towards others (Parent Ex. B at pp. 20-21). The CSE also recommended related services in a separate location which included individual speech-language therapy three times a week for 30 minutes, individual OT two times a week for 30 minutes, and individual PT two times a week for 30 minutes (Parent Ex. B at p. 22). The CSE also recommended that petitioners' son be provided with a full-time crisis management paraprofessional in the classroom (id.) and that the child participate in alternative assessment because his extreme cognitive delays would "preclude participation in standardized testing" (id.). The CSE recommended that with adult supervision the child could participate in lunch, assemblies, trips and all other school activities (id.). The IEP provided that the recommended 12-month program would begin September 2006 and be for a one-year period (Parent Ex. B at pp. 1, 2).

Both petitioners attended the May 10, 2006 CSE meeting, which lasted for "an hour, hour and a half" (Parent Ex. B at p. 2; Tr. p. 116). The child's mother indicated that the major topic of discussion at the CSE meeting was the type of placement that would be good for the child (Tr. p. 116). In response to questioning at the impartial hearing, the child's mother indicated that there was no discussion of particular sites and that she asked "where" the CSE was recommending placement for her son (Tr. p. 98). She also testified that she was told that respondent would mail her a paper and that she would have a

booklet (Tr. pp. 98, 117, 146). She also testified that the district representative at the CSE meeting gave her his name and telephone number for her to call him regarding the child's placement (Tr. pp. 99, 117).

Subsequent to the May 10, 2006 CSE meeting petitioners visited a number of schools, including public schools and approved private schools (Tr. pp. 101-02). Respondent notified petitioners by letter of a specific placement site, PS 255 at School 16 (Tr. pp. 103, 105; Parent Ex. X). The child's mother visited that school on June 9, 2006, but for a number of reasons concluded that it was not appropriate for her son (Tr. pp. 103, 148-49). Petitioners communicated to respondent their rejection of the school and they received another letter from respondent which identified a second school (Tr. pp. 103, 105-06). The child's mother called that school and spoke with two persons on the telephone (Tr. pp. 104, 106-07, 150, 151). Based on the information obtained during that conversation, she concluded that the second school was inappropriate for her son (Tr. pp. 104, 150-51).

The child's mother also testified that she called the district representative from the May 10, 2006 CSE meeting to discuss the child's placement and advised him that she had looked at schools, that she had found a school that she thought would be appropriate for her son, and that the school was the Rebecca School (Tr. pp. 98-100, 117). The record does not indicate the date of the call and the child's mother testified that she "might have called him twice" (Tr. p. 98). During that telephone call, the district representative asked the child's mother to provide him with a list of the schools that she had looked at (Tr. p. 100). Petitioners did so, apparently sometime in the last two weeks of August (Tr. pp. 100, 102; see

also Tr. pp. 102-03; Parent Ex. X). I note that the list of schools includes the school the child's mother visited on June 9, 2006, and also a statement that this school was not considered appropriate (see Parent Ex. X).

On September 5, 2006, petitioners submitted a due process complaint notice to respondent with respect to the appropriateness of the program offered to the child for the 2006-07 school year; including summer 2007 (see Parent Ex. A; see also 20 U.S.C. § 1415[b][7][A]). Petitioners' due process complaint notice indicated that the IEP developed at the May 10, 2006 CSE meeting was defective for a number of reasons including that no general education teacher, social worker, or educational evaluator attended that meeting; that respondent "failed to maximize exposure to general curriculum"; that parts of the IEP were copied from an earlier, preschool IEP; that the IEP did not offer individual parent training and counseling; that its goals and objectives were "unduly ambiguous," "insufficiently challenging," and "not objectively reasonable"; and that present levels of performance were not properly assessed, were not reflective of the student, and were "too vague and sparse" (Parent Ex. A at p. 2). Petitioners asserted that the May 10, 2006 IEP was the product of predetermination; that the child's "placement was not properly recommended, offered, and identified at the IEP [sic]"; and that a Functional Behavior Assessment (FBA) and Behavioral Intervention Plan (BIP) "should have been developed" (id.). The notice also indicated that services from the child's 2005-06 IEP had been "grossly unfulfilled" (id.).

Petitioners' due process complaint notice stated that they sought "prospective, declaratory, compensatory and remedial relief, and other appropriate relief deemed appropriate" and "reimbursement ... to the extent that they incur costs and expenses attempting to provide an appropriate educational program for [their son]" (Parent Ex. A at p. 1). It stated that "[f]or 2006-07," petitioners' son was attending the Rebecca School and was also receiving six hours a week of individual SEIT services and four hours a week of speech-language therapy, and indicated that this was less than the amount set out in his previous IEP (Parent Ex. A at p. 2). The due process complaint notice sought reimbursement for tuition at the Rebecca School, 10 hours a week of SEIT services, and additional group speech-language therapy (Parent Ex. A at p. 3). It also included a specific request for "a compensatory award as a result of grossly unfilled IEP mandates from [the] 2005-06 [school year]" (Parent Ex. A at p. 2; see also Parent Ex. A at p. 3)[2]

The impartial hearing officer was appointed on October 3, 2006 (IHO Decision at p. 2). The impartial hearing was scheduled for October 16, 2006 during the resolution period in order to determine the child's

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[2] Prior to their September 5, 2006 due process complaint notice, petitioners had written respondent on June 11, 2006 stating that "with the end of the [2005-06] school year approaching, [their son's] IEP service mandates [were] far from being fulfilled" (Tr. pp. 128-29; Parent Ex. F). Petitioners' June 11, 2006 letter stated that they intended to seek reimbursement for their expenditures in attempting to secure the "fulfillment" of the IEP, and requested a proposal from respondent to compensate them for the hours that were not provided (Parent Ex. F). The record provides no information with respect to any response from respondent to this letter.

pendency placement (id.). At that time, petitioners requested the continuation of the after school SEIT and speech-language services which were set forth in the earlier IEP dated March 24, 2006 (see Parent Ex. C), that such services be provided as of the time their due process compliant notice was filed on September 5, 2006, and that petitioners be reimbursed for their payment for any such services (Tr. pp. 4-5). Petitioners did not request the continuation of any other services during the pendency of the impartial hearing as they had unilaterally enrolled their son in the Rebecca School (Tr. p. 5). Respondent's representative agreed to petitioners' specific request for pendency services (id.). The impartial hearing officer issued an interim order dated October 17, 2006, which memorialized the agreement of the parties and ordered respondent to provide the child with ten hours a week of home-based SEIT services and five hours a week of home-based speech-language services, effective September 7, 2006, the date respondent received petitioners' due process demand, through the duration of the proceedings (IHO Interim Decision at p. 3). The impartial hearing officer also ordered respondent to reimburse petitioners for any such services they had already provided upon receipt of appropriate evidence of payment (id.).

The impartial hearing commenced on November 14, 2006, and concluded on November 28, 2006. In a "corrected decision" dated December 28, 2006 (see IHO Decision at p. 20), the impartial hearing officer determined that neither a regular education teacher, nor a social worker, nor an educational evaluator was required to attend the May 10, 2006 CSE meeting (IHO Decision at pp. 8, 9). The impartial hearing officer found "no merit" to petitioners' claim

that respondent failed to maximize exposure to the general curriculum (IHO Decision at p. 8). She also concluded that information that might have been copied from previous IEPs reflected information in relevant documents provided to the May 10, 2006 CSE meeting and that it could be expected that certain student information could remain the same during dates "close in time" (IHO Decision at pp. 9-10). The impartial hearing officer concluded that parent training and counseling did not need to be on the IEP. She also found that respondent's witness testified sufficiently that such training was a part of respondent's program and that petitioners provided no contrary testimony (id.). The impartial hearing officer further found that the goals and objectives on the IEP were "generally clear and specific," and "appropriate for the levels at which [the child] was assessed," and that they provided "adequate guidance to the child's teachers and providers" and addressed all relevant areas of need (IHO Decision at pp. 10-11). She also concluded that the child's present levels of performance on the IEP were adequate (see IHO Decision at p. 11). The impartial hearing officer concluded that there was no reason for an FBA or BIP, as the information in the evaluations and on the IEP indicated that "the nature of the child's behavior [was] understood" and "[was] being effectively addressed" (IHO Decision at p. 14).

The impartial hearing officer also concluded that the May 10, 2006 CSE had identified the child's placement at the CSE meeting, a site had been offered, petitioners had refused that site, another site was offered, and petitioners had not shown that they were harmed by the failure to identify a site at the CSE meeting (IHO Decision at p. 15). She also

concluded that while petitioners did not like either site, they had not requested a CSE meeting, had not shown that either site was not in accordance with the IEP's recommendation or that it had not met particular regulations, and that there was no evidence that the offered sites would not have met the child's needs (id.).

With one exception, the impartial hearing officer concluded that petitioners had not shown that the IEP was predetermined and that the record indicated that the IEP reflected child-specific information and an appropriate placement (IHO Decision at p. 11). The impartial hearing officer concluded that the record showed that the amount of speech-language services provided to petitioners' son was not based on the child's individual needs but was a standard amount that did not vary (IHO Decision at p. 10). She also concluded that petitioners' son had "severe speech and language delays," and that the level of speech and language services did not meet those needs (IHO Decision at pp. 11-12).

The impartial hearing officer also found that except for the amount of speech-language therapy offered to the child, petitioners had not met their burden to show that the "overall program" recommended by the CSE was inappropriate (IHO Decision at p. 16). She indicated that petitioners "did not submit any allegation, evidence or testimony relative to the program recommended by the May 10, 2006, CSE and how it might be deficient," and concluded that therefore there was "no basis" for determining that the child needed other additional services after school (id.).

The impartial hearing officer further found that petitioners did not meet their burden of proof to show that the Rebecca School was an appropriate placement for their son (IHO Decision at pp. 16-18).

With respect to petitioners' request for compensatory services, the impartial hearing officer concluded that petitioners' son had not received the amount of SEIT services and speech-language services that were provided for in his 2005-06 IEP (IHO Decision at p. 18). She determined that the child should receive seven hours a week of SEIT services for the 2006-07 school year and 40 hours of speech-language therapy over the course of that school year (id.).

During the impartial hearing, petitioners had requested reimbursement for certain speech-language therapy provided to their son in September and October 2005. The impartial hearing officer determined that this request fell outside of petitioners' due process complaint notice and did not award the requested payment (IHO Decision at p. 19). During the impartial hearing, petitioners also requested that an assistive technology assessment be performed. The impartial hearing officer concluded that this request was also outside of petitioners' due process demand (id.). Therefore, she did not address the matter on the merits and referred it to respondent's CSE to be considered within 30 days of the date of her decision (IHO Decision at pp. 19, 20).

Petitioners appeal on a number of grounds and argue that a State Review Officer should order tuition reimbursement and payment for the child's continued attendance at the Rebecca School for the 2006-07 school year and the pendency level of SEIT

and speech-language services for the 2006-07 school year. While they have withdrawn a number of their contentions raised at the impartial hearing, petitioners continue to assert on appeal that respondent's May 10, 2006 IEP was deficient. In particular, they argue that respondent had failed to provide their son with access to the general curriculum to the "maximum extent appropriate"; that no individual parent training and counseling was recommended or offered on the IEP; that the goals and objectives on the IEP were "unduly vague, insufficiently challenging and not objectively measurable"; that an FBA and BIP were required; and that the "site" of the child's program should have been developed and offered at the CSE meeting with the "full participation of parents as equal members of the IEP team" as a part of the placement and program determination process.

Petitioners also maintain on appeal that respondent's recommended program is "predetermined." In particular, petitioners argue that respondent's District 75 6:1+1 autism program offered to the child "is a cookie-cutter, one size fits all program and placement that is the only placement and program offered when a school age child has been diagnosed with autism" and asserts that "no other program was available to be considered" (Pet. ¶ 18). Petitioners also seek a determination that the impartial hearing officer's conclusion that respondent provided their son with an inadequate level of speech-language therapy (see IHO Decision at pp. 11-13) amounted to a deprivation of free appropriate public education (FAPE), that respondent's recommended amount of speech-language therapy was "the by-product of impermissible predetermination," and that the

amount of speech-language therapy recommended on the IEP was inconsistent with the requirements of 8 NYCRR 200.13(a)(4). Petitioners also appeal the impartial hearing officer's finding that their son's placement at the Rebecca School was not an appropriate placement and that the child's placement there should be supplemented by the amount of SEIT and speech-language therapy provided to the child under pendency. Petitioners also claim that equitable considerations do not preclude or diminish petitioners' requested tuition reimbursement award.

Respondent argues in support of the impartial hearing officer's determination regarding the adequacy of the IEP and the inappropriateness of petitioners' placement and argues that equitable considerations do not support an award of tuition reimbursement. Respondent has not appealed the impartial hearing officer's determination to grant additional services to petitioners' son. An impartial hearing officer's decision is final and binding upon the parties unless appealed to the State Review Officer (20 U.S.C. § 1415[i][1][A]; 34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][4][v]). Consequently, this part of the decision is final and binding and I do not reach the issue of the propriety of that determination (Application of the Bd. of Educ., Appeal No. 05-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

The central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482)[3] is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 126 S. Ct. 528, 531 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. §§ 300.17 and 300.22; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320). "The core of the statute" is the collaborative process between parents and schools, primarily through the IEP process (see Schaffer, 126 S. Ct. at 532). A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). In Burlington, the court found that Congress intended retroactive

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[3] Congress amended the IDEA, effective July 1, 2005 (see Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647 [2004] [codified as amended at 20 U.S.C. § 1400, et. seq.]). Since the relevant events at issue in this appeal occurred after the effective date of the 2004 amendments, the new provisions of the IDEA apply and citations contained in this decision are to IDEA 2004, unless otherwise specified.

reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (Burlington, 471 U.S. at 370-71). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP" (Burlington, 471 U.S. at 370-71; Application of a Child with a Disability, Appeal No. 06-121; see 20 U.S.C. § 1412[a][10][C][ii]).

The first step is to determine whether the district offered to provide a FAPE to the student (see Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). The IDEA directs that, in general, a decision by an impartial hearing officer shall be made on substantive grounds based on a determination of whether or not the child received a FAPE (20 U.S.C. § 1415[f][3][E][i]; see also 34 C.F.R. § 300.513[a][1]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a child did not receive a FAPE only if the procedural inadequacies (a) impeded the child's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the

child, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; see 34 C.F.R. § 300.513[a][2]). Also, an impartial hearing officer is not precluded from ordering a school district to comply with IDEA procedural requirements (20 U.S.C. § 1415[f][3][E][iii]; see also 34 C.F.R. § 300.513[a][3]; Matrejek v. Brewster Cent. Sch. Dist., 2007 WL 210093, at *2 [S.D.N.Y. Jan. 9, 2007]).

The Second Circuit has determined that "a school district fulfills its substantive obligations under the IDEA if it provides an IEP that is 'likely to produce progress, not regression'" and if the IEP affords the student with an opportunity greater than mere "trivial advancement" (Cerra, 427 F.3d at 195, quoting Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]), in other words, is likely to provide some "meaningful" benefit (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]). The IDEA, however, does not require school districts to develop IEPs that maximize the potential of a student with a disability (Rowley, 458 U.S. at 197 n.21, 199; see Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114, 300.116; 8 NYCRR 200.6[a][1]). The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 126 S. Ct. at 537 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs,

establishes annual goals related to those needs, and provides for the use of appropriate special education services (Application of the Bd. of Educ., Appeal No. 06-076; Application of a Child with a Disability, Appeal No. 06-059; Application of the Bd. of Educ., Appeal No. 06-029).

Petitioners assert that respondent failed to offer their son access to the general curriculum to the maximum extent appropriate. The impartial hearing officer indicated that petitioners failed to provide sufficient evidence to show that this argument has merit. I agree.

The IDEA and the Regulations of the Commissioner of Education provide that an IEP must, inter alia, include a statement of present levels of academic achievement and functional performance, including a description of how the child's disability affects his or her involvement and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][I][aa]; 8 NYCRR 200.4[d][2][i][a]; see also 34 C.F.R. § 300.320[a][1][i]). The IDEA and state regulations also require that the IEP include measurable annual goals, including academic and functional goals, designed to meet the child's needs arising from his or her disability, to enable the child to be involved in and progress in the general curriculum (20 U.S.C. § 1414[d][1][A][i][II][aa]; 8 NYCRR 200.4[d][2][iii][a][1]; see also 34 CFR § 300.320[a][2][i][a]). For a student who takes a New York State alternative assessment and for each preschool student with a disability, the state regulations provide that "the IEP shall include a description of the short-term instructional objectives and/or benchmarks that are the measurable intermediate steps between the student's present

level of performance and the measurable annual goal" (8 NYCRR 200.4[d][2][iv]; see also 34 C.F.R. § 300.320[a][2][ii]). The IDEA and state regulations also provide that "the IEP shall indicate the recommended special education program and services that will be provided for the child to be involved and progress in the general education curriculum (20 U.S.C. § 1414[d][1][A][i][IV][bb]; 8 NYCRR 200.4[d][2]v][a][2]; see Schied v. Bd. of Educ. of Penfield Cent. Sch. Dist., 2006 WL 2927875, at *5 [W.D.N.Y. Oct. 12, 2006]; see also 34 C.F.R. § 300.320[a][4][ii]).

In this case, the child's present levels of performance were adequately described in the May 10, 2006, IEP. The IEP accurately stated that petitioners' son presented with significant expressive and receptive language impairments as well as oral motor deficits, secondary to a diagnosis of autism (Parent Exs. B at p. 3; I at p. 1). In addition the IEP indicated that the child lacked a form of functional expressive communication, with the exception of some modified basic signs (id.). The IEP also noted that the child's social skills were at the 20-month level (Parent Exs. B at p. 4; K at p. 3). The child was described as able to seek assistance when he had difficulty by taking an individual's hand and providing an utterance (id.). In addition, the IEP indicated that the child responded to frustration by crying, biting his hand, or pulling hair (id.). The IEP also indicated that the child preferred to play independently but also allowed an adult to join (id.). The IEP stated that the child demonstrated motor skills at the 29-month level (Parent Exs. B at p. 5; K at p. 3). Fine motor skills were reported to be at the 25-month level (Parent Exs. B at p. 6; N at p. 2). In addition, the IEP noted that the child demonstrated

sensory seeking behaviors that included biting his hand and mouthing hair and fuzz (Parent Exs. B at p. 6; L at p. 1; N at p. 1). It properly identified gross motor concerns involving balance and body tone (Parent Exs. B at p. 7; O at pp. 2-3)

The May 10, 2006 IEP stated that academically the child required a high student to staff ratio that would continually provide verbal prompts and would refocus him for learning (Parent Ex. B at p. 3). The IEP stated that the child needed "a highly structured environment with 1:1 instruction to perform fine motor tasks," and that tasks needed "to be broken down into small steps with reinforcers present for optimal performance" (Parent Ex. B at p. 7). The IEP accurately described the child's emotional management needs and recommended that they be addressed through modeling, reinforcement, and prompting of appropriate classroom behavior and a full time paraprofessional (Parent Ex. B at pp. 4, 22). It correctly indicated the child's need for sensory input and a sensory diet to address his sensory seeking behaviors, which included biting his hand and mouthing fuzz (Parent Exs. B at p. 6; L at p. 1; N at p. 1; O at p. 1). It recommended a 12-month placement in an autism special class in a specialized school district with a student to staff ratio of 6:1+1 to address the child's global, significant needs (Parent Ex. B at pp. 1, 2, 3-7, 20, 21, 22; see also Parent Exs. O, N, L, K, I, J). The IEP also provided the child with speech-language therapy, OT, and PT (Parent Ex. B at p. 22).

The IEP's goals matched all relevant areas of the child's significant needs including daily adaptive living skills, gross motor skills, fine motor skills, sensory processing, oral motor skills, expressive

language skills, receptive language skills, pragmatic language skills, social skills and emotional skills (see Parent Ex. B at pp. 8-19; see also Parent Exs. O; N; L; M; K; I; J).

Because of the child's significant and multiple needs, the May 10, 2006 CSE determined that petitioners' son would participate in alternative assessments (Parent Ex. B at p. 22). The IEP therefore included appropriate short-term instructional objectives or benchmarks (see 8 NYCRR 200.4[d][2][iv]; see also 34 C.F.R. § 300.320[a][2][ii]). The IEP included a series of appropriate short-term instructional objectives relating to adaptive living skills including toileting and communicating the need for toileting, as well as hand washing and teeth brushing (Parent Ex. B at pp. 8, 19). It also included a series of appropriate short-term gross motor instructional objectives in order to improve the child's strength and balance relating to a variety of specific situations within the environment (Parent Ex. B at p. 9). The child's sensory processing goal was addressed by specific short-term instructional objectives relating to particular vestibular, tactile, and proprioceptive input, and pre-academic tasks which included imitating vertical and horizontal lines, making circular strokes, snipping paper, and assembling a three-piece form board puzzle (Parent Ex. B at p. 10). The IEP addressed the child's oral motor and feeding goals through specific short-term instructional objectives including the imitation of various lip and tongue movement patterns, the awareness of and reaction to drooling, bite and chewing patterns for lateralizing food from one side of the mouth to the other, lip closure to prevent food loss from the child's mouth, and the production of vowels and consonant-

vowel combinations for speech (Parent Ex. B at pp. 12, 16). Oral motor short-term instructional objectives included jaw stability and lip closure, as well as tongue mobilization (Parent Ex. B at pp. 12, 15). The IEP included a number of short-term receptive language skills and instructional objectives including appropriate eye contact, vocalizing needs, spontaneous vocalization during communication exchanges and social interaction, receptive vocabulary of nouns and verbs, and following one-step and two-step verbal directions (Parent Ex. B at pp. 13, 17). Short-term expressive language instructional objectives included initiation and response to gestures; imitation of vocal sounds; use of single words; use of nouns; production of target sounds in isolation, syllables, and single word utterances; requesting objects through the use of one word vocalizations; requesting objects via signs; and beginning a basic Picture Exchange Communication System (PECS) by matching pictures to objects (Parent Ex. B at p. 13, 16). Pragmatic language short-term instructional objectives included attending, the use of ritual greetings, symbolic play, and cooperative play (Parent Ex. B at p. 14). Social and emotional short-term instructional objectives included involvement in teacher selected activities, expression of needs through gestures and words, controlling unacceptable impulses such as hair pulling and hand biting, eye contact when interacting with others, independently returning and initiating greetings, engaging in pretend play activities, and sharing toys (Parent Ex. B at pp. 18-19). The IEP also included a short-term instructional objective related to the cessation of inappropriate behaviors (see Parent Ex. B at p. 11).

Based on my review of the IEP, I concur with the impartial hearing officer that the IEP was adequate. While the child could not be placed in a regular education class or program, his IEP properly described his needs, accurately reported his present levels of performance, set out goals in all appropriate areas of need, included appropriate short-term instructional objectives for each goal as a part of his alternate assessment program, recommended an appropriate placement for kindergarten, recommended appropriate strategies and a full-time paraprofessional to address his behavior, and provided related services in appropriate areas.

I also agree with the impartial hearing officer's conclusion that the failure to have parent counseling and training on the IEP did not rise to the level of a denial of FAPE (see IHO Decision at pp. 8-9). At the impartial hearing, respondent's representative testified that parent training and counseling "is a part and parcel of District 75 programs for children who are classified with autism" (Tr. pp. 266, 267). Respondent's representative also agreed with petitioners' attorney during cross-examination that parent counseling and training was "embedded" in its program for such children (Tr. p. 272). In light of the testimony that respondent's recommended program for petitioners' son included parent counseling and training services, and that petitioners did not show that they would need parent counseling and training as set forth in the state regulations in order for their son to receive educational benefit from his recommended program, I find that respondent's failure to list parent counseling and training and the services that it would provide petitioners on the IEP did not deprive their son of a FAPE (see Application of a Child with

a Disability, Appeal No. 06-102). I do agree with petitioners, however, that parent counseling and training should have been identified on the child's IEP.

I do not agree with petitioners' assertion that the May 10, 2006 IEP was inadequate because the annual goals and short-term instructional objectives were "unduly vague, insufficiently challenging, and not objectively measurable." As indicated above, the annual goals on the child's IEP were appropriate as they were relevant to the child's areas of significant need as indicated by evaluations in the record (see e.g., Parent Exs. O; N; L; M; K; I; J) and all areas of significant need had annual goals attached to them (see Parent Ex. B at pp. 8-19). I also find, however, that the annual goals were vague and not measurable (see Application of a Child with a Disability, Appeal No. 99-92; Application of a Child with a Disability, Appeal No. 98-75; Application of a Child with a Disability, Appeal No. 95-15). Nonetheless, most of the short-term instructional objectives in the IEP were behaviorally specific and measurable and clarified those annual goals by providing the requisite specificity to enable the child's teachers to understand the CSE's expectations. Therefore, a FAPE was not denied (Application of a Child with a Disability, Appeal No. 05-076; Application of the Bd. of Educ., Appeal No. 04-031; Application of a Child with a Disability, Appeal No. 03-102; Application of a Child with a Disability, Appeal No. 03-095; Application of the Bd. of Educ., Appeal No. 02-025; Application of a Child with a Disability, Appeal No. 99-92; Application of a Child with a Disability, Appeal No. 99-6; Application of a Child with a Disability, Appeal No. 98-75; Application of a Child with a Disability, 95-15).

Nor do I agree with petitioners' claim that the annual goals and short-term instructional objectives in the IEP were "insufficiently challenging." I first note that petitioners point to no particular annual goal or specific short-term instructional objective with respect to this assertion. Petitioners' son has global, significant delays. I have reviewed the record and find that the short-term instructional objectives in the May 10, 2006 IEP were appropriately related to the child's needs, and the accomplishment of such short-term instructional objectives would result in meaningful improvement in light of the child's disability.

I concur with the impartial hearing officer that respondent's CSE was not required in this case to conduct an FBA or to include a BIP as part of the child's May 10, 2006 IEP. My review of the record indicates that respondent's CSE was responsive to the behavioral information relative to the child and the child's needs in this area. The March 9, 2006 report for petitioners' son advised that he needed "continuous prompting" (Parent Ex. K at pp. 3, 4, 5) and that he "would benefit from a 1:1 paraprofessional while in school" (id. at p. 5). The March 30, 2006 written "request to continue" the child's 1:1 aide (Parent Ex. U) also stated that the child "currently requires a 1:1 aide to assist him during his school day" (id.). Moreover, that document explains that the considerable progress the child had made over the course of the year "can be attributed to his having a one on one aide" (id.). That evaluative document also stated that the child "learns best in a highly structured environment with minimal distractions, where tasks are presented individually" and that "(t)his can only be accomplished with an aide at [the child's] side"; that the child "has made

cognitive language and social gains as a direct result of this individual attention"; and that "without an aide, [the child] would not have made the same amount of progress" (id.). The report also stated that during the brief periods when the aide has been absent the child's behavior "has regressed" and that in such circumstances he is "much more likely to engage in self-stimulatory behaviors that directly interfere with his learning" (id.).

The May 10, 2006 IEP provided that modifications for the child's needs included "a high student staff ratio to continually verbal [sic] prompt and refocus academic learning" and "modeling, reinforcement, prompting of appropriate classroom behavior" (Parent Ex. B at pp. 3, 4). As indicated above, the May 10, 2006 IEP also recommended that petitioners' son be provided with a full time 1:1 crisis management paraprofessional (Parent Ex. B at p. 22). Respondent's CSE further addressed the child's behaviors by including in the short-term instructional objectives in the May 10, 2006 IEP that the child would desist from certain behavior as a result of being refocused by his teacher (Parent Ex. B at p. 11). I find that by including the referenced short-term instructional objectives; by providing for modeling, reinforcement, and prompting of appropriate classroom behavior; and by recommending a full-time 1:1 crisis management paraprofessional on the child's IEP, respondent's CSE appropriately addressed the child's behavioral needs within the 6:1+1 classroom environment and in school related activities.

Petitioners' "predetermination" argument on appeal is that respondent's District 75 6:1+1 autism program that was offered to their son "is a cookie-

cutter, one size fits all program and placement that is the only placement and program offered when a school age child has been diagnosed with autism," and they assert that "no other program was available to be considered." I note here that petitioners did not make this claim at the impartial hearing. Petitioners also did not provide any evidence at the impartial hearing that respondent's 6:1+1 program was the only type of program offered to children with autism as they claim here. Because petitioners failed to raise the claim below, I will dismiss the claim. Moreover, I note that the record does not support petitioners' claim. The record indicates that respondent's CSE considered multiple instructional environments for petitioners' son. In particular, the IEP states that a special class (12:1+1) in a community school district was "considered insufficient to address [the child's] extreme cognitive and language delays" and also that a "residential placement" was "considered overly restrictive" (see Parent Ex. B at p. 21). I also agree with the impartial hearing officer that there was a significant amount of discussion at the May 10, 2006 CSE meeting about the child's placement, a fact that petitioners admit (see Tr. p. 116).

Further, the record shows that the educational program set forth in the IEP prepared for petitioners' son by respondent's CSE offered adequate programming to meet the child's individual needs (see Rowley, 458 U.S. at 181-82, 188-89, 201, 203-04, 210). The IEP included a recommendation for a full time 1:1 crisis management paraprofessional. Additionally, the annual goals and short-term instructional objectives reflected the specific needs of petitioners' son. Further, I do not agree with petitioners' claim that "predetermination" in respondent's recommended program is shown by a

lack of "individual development of individual goals and objectives at the CSE meeting." The claim that the annual goals and short-term instructional objectives were not developed at the CSE meeting was not asserted at the impartial hearing (see e.g., Parent Ex. A; Tr. pp. 20-35, 281-86) and I therefore dismiss the claim on appeal. However, I do note that the record does not show that the CSE had decided on the child's annual goals and short-term instructional objectives before the CSE meeting. To the contrary, it indicates that annual goals and short-term instructional objectives were discussed at the May 10, 2006 CSE meeting, that the CSE determined to use the annual goals and short-term instructional objectives from the child's earlier IEP, and that petitioners had the opportunity to participate in the decision-making regarding annual goals and short-term instructional objectives but did not do so (see Tr. pp. 116-17, 117-19). I also agree with the impartial hearing officer that respondent's CSE discussed the child's needs as well as his placement at its meeting (see Tr. pp. 98-99, 116). Additionally, the impartial hearing officer correctly concluded that the record does not show that respondent prevented petitioners from participating in the CSE meeting or that questions or statements from them were disregarded.

The impartial hearing officer concluded that the amount of speech-language therapy recommended by the May 10, 2006 IEP was predetermined (IHO Decision at p. 11; Tr. p. 110). Respondent has not appealed this determination and therefore I do not review it.

Petitioners argue on appeal that the amount of speech-language therapy recommended in the IEP does not meet the requirements set forth in 8 NYCRR 200.13(a)(4) regarding the amount of language instruction to be provided to children with autism and that the recommended amount of speech-language therapy in the May 10, 2006 IEP did not offer a FAPE. I do not agree with petitioners that the recommendation by respondent's May 10, 2006 CSE to provide their son with individual speech-language therapy 30 minutes a day, three times a week (see Parent Ex. B at p. 22) amounted to a deprivation of a FAPE. I have reviewed the evaluative information in the record relating to the child's speech and language needs including, but not limited to, the December 21, 2005 speech-language update (Parent Ex. M), the January 11, 2006 educational update (Parent Ex. L at pp. 2-3), the March 7, 2006 report (Parent Ex. K at pp. 2-3, 4-5), and the March 28, 2006 speech-language therapy progress report (Parent Ex. I), all completed prior to the May 10, 2006 CSE meeting. I find that the May 10, 2006 IEP properly identified and described the child's speech and language needs when considering those evaluations (see Parent Ex. B at pp. 3, 4). As indicated above, the May 10, 2006 IEP established annual speech and language related goals and short-term instructional speech and language related objectives that were related to the speech and language needs in those evaluations (see Parent Ex. B at pp. 12, 13, 14, 15, 16, 17). The receptive, expressive, and oral motor short-term instructional objectives in the May 10, 2006 IEP were specific and measurable and they were also consistent with the information in the speech-language therapy progress report closest in time to that CSE meeting (see Parent Ex. B at pp. 12, 13, 14,

15, 16; Parent Ex. I at pp. 1-2). I note also that the May 10, 2006 IEP reflected the speech and language related information in the child's March 7, 2006 report prepared by the child's SEIT and included annual goals and short-term instructional objectives which addressed, among other things, the speech and language needs set out in that report. I further note that 11 of the 23 goals on the May 10, 2006 IEP, and 42 of the 79 short-term instructional objectives in that IEP, addressed various speech, language, and oral motor needs of the child (see Parent Ex. B at pp. 8, 12-17). Further, petitioners have not shown that the speech and language related annual goals and short-term instructional objectives included in the May 10, 2006 IEP could be appropriately taught only by a speech-language therapist, and I find that this is not the case. Additionally, petitioners have not shown that the special education and related services and supplementary aids and services recommended by respondent's May 10, 2006 CSE for the child's 12-month 2006-07 IEP were insufficient for petitioners' son to advance appropriately toward attaining the speech and language related annual goals set forth in that May 10, 2006 IEP (see 20 U.S.C. § 1414[d][1][A][i][IV][aa]; 8 NYCRR 200.4[d][2][v][a][1]; see also 34 C.F.R. § 300.320[a][4][i]). Moreover, a social-emotional goal and corresponding short-term instructional objectives (see Parent Ex. B at p. 18) integrated the child's need to use speech-language skills in tasks that would encourage him to express himself with words and gestures, initiate greetings, and interact with others.

I find that respondent offered petitioners' son a comprehensive program to address his speech and language needs and that his educational program in

this area was reasonably calculated to enable the child to receive educational benefits and would be likely to provide the child with meaningful progress in this important area of significant need. Further, the May 10, 2006 IEP included relevant and appropriate detail related to the child's needs and present levels of performance, and included a set of appropriate annual goals and short-term instructional objectives with respect to the balance of the child's cognitive, motor, social-emotional, and self-care areas of need (see Parent Ex. B at pp. 4, 5, 6, 7, 8, 9, 10, 11, 18, 19; Parent Exs. C; K). Therefore, and taking into account that respondent's annual goals and short-term instructional objectives were comprehensive and integrated across all of the child's relevant program domains, I find that respondent's recommendation to provide the child with individual speech-language therapy for 30 minutes, three times a week did not amount to a deprivation of a FAPE. I also note that petitioners have not provided any evidence to show that their son would not have been able to receive a meaningful educational benefit as a result of the educational program recommended by respondent's CSE at its May 10, 2006 CSE meeting. Moreover, and with respect to the overall program recommended by respondent's CSE, I agree with the impartial hearing officer's conclusion that petitioners have not shown that their son required after school ABA or special education teacher services in order to receive meaningful educational benefit in his kindergarten program. While such services would have provided petitioners' son with additional benefit (see Parent Ex. K), the record does not show that but for such services the child would not have received meaningful educational benefit in the kindergarten program recommended by respondent.

Finally, I concur with the impartial hearing officer that respondent's CSE recommended a program for petitioners' son at its May 10, 2006 CSE meeting (see IHO Decision at p. 15; Parent Ex. B at p. 1). I note here that petitioners attended that CSE meeting (Parent Ex. B at p. 2) and participated in it (Tr. pp. 98-99, 110, 116, 117). The record indicates that during the CSE meeting the "type of placement" for the child was discussed; that individual locations were not; that petitioners asked about the location the CSE was recommending for their child; that petitioners were advised that they would have a booklet, and an opportunity to look at different schools; that feedback about program site was desired; and that petitioners were given a CSE member name and telephone number to call to further discuss their son's placement (Tr. pp. 98, 99, 116, 117, 146). After the CSE meeting petitioners were given the opportunity to see suggested specific sites and a site was offered to them (see IHO Decision at p. 15; Tr. pp. 103, 103-05, 106). I note further that petitioners agreed with respondent's representative at the impartial hearing that subsequent to the May 10, 2006 CSE meeting, petitioners "received two site offers with specific names of schools" for their son (Tr. p. 148). In particular, the record shows that respondent advised petitioners in writing of an initial recommended site, petitioners visited that location and rejected it, and thereafter respondent wrote petitioners and suggested another, different site location (see Tr. pp. 102-03, 105-06, 148-49; see Parent Ex. X). While petitioners obtained information regarding the second proffered program site by telephone, and on that basis concluded that it was inadequate for their son (Tr. pp. 104, 148, 105-07, 150-51), the record does

not show that petitioners communicated their conclusion regarding this site, or any concerns about it, to respondent. Moreover, as the impartial hearing officer pointed out, petitioners could have requested a CSE meeting to discuss their concerns relating to the recommended placement location (see 8 NYCRR 200.4[e][4]). The record does not indicate that they did so. Based on these facts, and contrary to petitioners' claim, I find that they have not shown that they were deprived of an opportunity for meaningful parental participation in the development of the May 10, 2006 IEP (see Cerra, 427 F.3d at 192-94; Perricelli, 2007 WL 465211, at *10-*15).

Having so determined, the necessary inquiry is at an end with respect to petitioners' claim for tuition reimbursement and other relief with respect to the 2006-07 school year and there is no need to reach the issue of whether the Rebecca School was an appropriate placement and whether that program should be appropriately supplemented by additional SEIT and speech-language therapy (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d. Cir. 2000]; Walczak, 142 F.3d at 134; Application of a Child with a Disability, Appeal No. 03-058).

I have considered petitioners' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision is annulled to the extent that it found that parent counseling and training need not have been expressly included in the child's IEP.

Dated: **Albany, New York**
April 2, 2007

PAUL F. KELLY
STATE REVIEW OFFICER

FINDINGS OF FACT AND DECISION

Case Number:	106414
Student's Name:	T_____ Y_____
Date of Birth:	December 19, 2001
District:	24
Hearing Requested By:	Parent
Date of Hearing:	October 16, 2006 November 14, 2006 November 28, 29006 [sic]
Hearing Officer:	Diane Cohen, Esq.

CORRECTED

Hearing Officer's Findings of Fact and Decision
Case No. 106414

NAMES AND TITLES OF PERSONS WHO APPEARED OCTOBER 16, 2006

Randi Rothberg	Attorney, Mayerson & Associates	Parent
Barry Mastellone	Chairperson Designee, CSE District 24	Department of Education

NAMES AND TITLES OF PERSONS WHO APPEARED NOVEMBER 14, 2006

Gary Mayerson	Attorney	Parent
T_____ Y_____	Parent	
K_____ Y_____	Parent	
Jana Diamond	ABA Lead Teacher	Parent
Tanya Sanchez	Supervisor/ Speech Services	Parent
Kenneth A. Stark	Chairperson Designee, CSE District 24	Department of Education

NAMES AND TITLES OF PERSONS WHO APPEARED NOVEMBER 28, 2006

Gary Mayerson	Attorney	Parent
T_____ Y_____	Parent	
K_____ Y_____	Parent	
Tina McCourt	Program Director, Rebecca School	Parent
Rosemary Randazzo (Via Telephone)	Teacher, Rebecca School	Parent
Kenneth A. Stark	Chairperson Designee, School Psychologist, CSE District 24	Department of Education

Introduction

On October 3, 2006, I was appointed hearing officer pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.§1415(f)(1) in the case of T_____ Y. The parents requested that a hearing be scheduled during the resolution period in order to determine the child's pendency placement. A hearing was held on October 16, 2006, and I issued an interim order wherein I ordered that the New York City Department of Education (the "Department") continue to provide ten hours per week of home based special education itinerant teacher ("SEIT") services and five hours per week of homebased speech and language services from

September 7, 2006 and through the pendency of these proceedings. I further ordered that if the parents had already paid for any of these services, the Department would reimburse the parents for such payment upon receipt of appropriate evidence of such payment.

A hearing on the merits was scheduled after the resolution period ended on October 7, 2006. The attorney for the parents was unavailable for a hearing until November 14, 2006. The parents requested an extension of the decision date. I granted that request, considering that the issue was tuition reimbursement and that the child would not be harmed by the delay. I further considered the fact that the parents wanted Mr. Mayerson to represent them personally and that he was unavailable until November 14, 2006. The district did not object to the delay. The first day of hearing was held on November 14, 2006. The parents requested an extension of the decision date. I granted that request and extended the date until December 21, 2006. We were unable to complete the case on November 14. The hearing was completed on November 28, 2006. The record close date was December 7, 2006. The decision is therefore due on December 21, 2006.

The parents requested a hearing based on assertions that (a) the individualized education program (the "IEP") mandate from the 2005-2006 school year was grossly unfulfilled; and (b) the IEP meeting and the IEP for the 2006-2007 school year failed on procedural and substantive grounds. In particular, regarding the 2006-2007 school year, the parents allege that (1) no general education teacher was present at the IEP meeting, (2) the Department failed to maximize exposure to the general

curriculum, (3) no individual parent training and counseling was offered for the parents of a child classified as having autism, (4) no educational evaluator attended the May 10, 2006 IEP meeting, (5) no school social worker attended the May 10, 2006 IEP meeting, (6) the academic performance and learning characteristics report was copied directly from the CPSE review on March 24, 2006, (7) the social and emotional performance report was copied directly from the CPSE review on March 24, 2006, (8) one health and physical development report was directly copied from the CPSE review on March 24, 2006, (9) the goals and objectives in the IEP are unduly ambiguous, are insufficiently challenging, and are not objectively reasonable, (10) the Department failed to properly assess "present levels", (11) the present levels of performance in the IEP are too vague and sparse and do not reflect T_____s present levels in order to create a meaningful baseline from which to assess T_____s needs, (12) the Department's IEP is the by product of policy and predetermination, (13) the Department failed to develop a functional behavioral analysis (an "FBA") or a behavioral intervention plan (a "BIP"), despite significant interfering behaviors, and (14) placement was not properly recommended, offered, and identified at the IEP meeting.

The parents request that I order the Department to reimburse T_____s parents for tuition at the Rebecca School, 10 hours of SEIT services weekly and additional speech and language therapy. They also request that I award compensatory education based on their claim that the IEP mandate from 2005-2006 was unfilled.

Evidence Submitted

The parents submitted the IEP, dated May 10, 2006, (the "May 10 IEP") as evidence. The IEP recommends that T_____ be classified as a child with autism and be placed in a special class in a specialized school, with a 6:1:1 staffing ratio. The Committee on Special Education (the "CSE") also recommended that the child receive three 30 minute sessions per week of individualized speech and language therapy, two 30 minute sessions of individualized occupational therapy, and two 30 minute sessions of individualized physical therapy per week. In addition, the child was given a full time 1:1 crisis management paraprofessional. See Exh. B.

The academic performance and learning characteristics section of the IEP indicate that:

> "[T_____ has] significant expressive and receptive language impairments as well as oral motor deficits all secondary to a diagnosis of autism. T_____ lacks a form of functional expressive communication with the exception of some basic signs. T_____ makes modified signs for [several words]. With the use of PROMPT, a tactile kinesthetic approach that provides input to the oral musculature, T_____ has begun to produce [certain consonant-vowel combinations] when prompted . . . approximately 60% of the time. In addition, he has begun to approximate [certain other words]. Oral motor deficits are characterized by an open mouth posture and decreased control of oral secretions, with significant drooling. There is poor dissociation and range of motion of the lips, tongue and jaw, which impacts speech production. Receptive

language impairments are characterized by difficulty following directions and identifying items on request. T_____ does not consistently look at objects the clinician calls attention to or respond to inhibitory words such as "no". Exh. B, p. 3

The Social/Emotional performance section of the IEP indicates that:

"T_____ is currently demonstrating social skills at the 20 month level. T_____ is a friendly, self-directed child who eagerly participates in songs and fingerplays. He is able to initiate his own play activities and demonstrates toy and food preferences. T_____ asks for assistance when having difficulty by taking an individual's hand and providing an utterance. When T_____ is frustrated, he responds by crying, biting his hand, or pulling hair. He prefers to play independently but allows an adult to join in play. T_____ requires reinforcement and prompting to engage in non-desired activities." Exh. B, p. 4

The Social/Emotional Management Needs section indicates that Tyler requires "modeling, reinforcement, prompting of appropriate classroom behaviors." Exh. B, p. 4

The health and Physical Development Section of the IEP indicates that:

"T_____ is a 4 year old boy who demonstrates sensory seeking behaviors including biting his hand & mouthing hair & fuzz. Sensory input & sensory diet are used to decrease these behaviors & also to improve transitioning, body

awareness & attention. The HELP checklist places fine motor skills at the 25 mth old skill level. Imitation of lines and stringing beads are emerging skills." Exh. B, p. 5

The section further states that:

"T_____ continues to have gross motor concerns regarding balance and tone. He still needs a highly structured environment with 1:1 instruction to perform fine motor tasks. Tasks still need to be broken down into small steps with reinforcers present for optimal performance." Exh. B, p. 6

The IEP provides for goals relating to adaptive living, sensory processing, visual motor/visual perceptual skills, fine motor skills, abusive behaviors, oral/motor skills, feeding skills, receptive and expressive language skills, pragmatic skills, strength and range of motion of the oral musculature, speech skills, and social/emotional skills.

The parents also submitted an IEP, dated March 24, 2006, (the "March 24 IEP") prepared by the Committee on Preschool Special Education (the "CPSE") less than two months prior to the May 10, 2006 IEP.

The parents submitted an Educational Progress Report prepared by TheraCare, dated October 23, 2006 (Exh. E). The report indicates that T_____ is nonverbal. It notes that T_____s cognitive skills are at the 23 month age range, his communication skills are at the 17 month age range, his receptive language skills are more developed. It notes that T_____ scored at the 21 month level in social

emotional development and his motor development skills are at the 33 month age range, his self-help skills are at the 27 month age range and is not toilet trained and does not cooperate by sitting on the toilet, wash and dry his face or brush his teeth. The report opines that he requires ongoing 1:1 special education services in order to function effectively in his classroom and real-life setting. requires continuous prompting throughout the day. It recommends that he continues receiving special education support in the form of applied behavioral analysis to address his significant delays, speech therapy, occupational therapy and physical therapy.

The parents submitted a letter from Sharon Herzfeld, M.D., dated May 11, 2006. Dr. Herzfeld notes that T____ has limited expressive language and limited eye contact, but that his receptive language was intact. She noted that T____ exhibited features of sensory integration, vestibular and fine motor difficulties, but that his cranial nerve, gross motor and deep tendon reflex examinations were normal. She opines that T____ requires a nurturing educational environment with intensive speech, play and sensory integration therapeutic modalities.

The parents submitted a progress report by Loretta Dowlat, a speech-language pathologist, dated March 28, 2006 (Exh. 1). Ms. Dowlat notes that T____ has improved in expressive language skills but functional communication is not consistent. She further notes that oral motor skills have improved with increased strength and range of motion of the articulators, but that drooling is still significant and oral motor deficits impact on T____s ability to articulate. She notes that receptive skills have

improved, but that more work is needed to increase consistency of object identification.

The parents submitted an age-out report by TheraCare, dated March 9, 2006, and prepared by Rosemary Randazzo, a special education teacher. (Exh. K). Ms. Randazzo opines that T_____ requires ongoing 1:1 special education services in order to function effectively in his classroom and in a real-life setting, that he requires continuous prompting throughout the day and would benefit from a 1:1 paraprofessional while in school. She recommends that he continue receiving special education support in the form of applied behavioral analysis in order to address his significant delays. T_____ needs continuous 1:1 support to help him exceed and improve his skills. She also recommends that he continue to receive speech therapy, occupational therapy and physical therapy to address his delay.

The parents also submitted an educational update, dated January 11, 2006, by Marcus Avenue Early Childhood Developmental Program, and prepared by Linda Soldo, special educator. (Exh. L). Ms Soldo notes that T____ becomes frustrated when a particular toy is removed, when he is told no, or when demands are placed on him to finish a particular task. She notes that his frustration is exhibited in compulsive and aggressive behaviors such as grabbing, pulling of hair and biting his hand. T_____ has exhibited the compulsive behavior of attempting to obtain hair or small piece of fuzz that he will then mouth. T_____ continues to respond to a highly structured, organized and routinized environment with his 1:1 assistant, and continues to make gains in almost all aspects of classroom life.

Ms. Soldo notes that T_____ continues to require verbal and physical prompting to interact with other children, continues to display aggressive behavior towards himself and others when upset or frustrated. At times, T_____ will cover his ears when a classmate is crying or if there is a great deal of noise. Ms. Soldo notes that T_____s progress in his cognitive skills is the result of consistent 1:1 instruction with minimal distractions to attend to activities and remain on task, coupled with reinforcement. She notes that T_____ is staying dry for longer periods of time, will sit on the potty and has on several occasions urinated in the potty.

Findings of Fact and Decision

Under the IDEA, a child with a disability is entitled to a free appropriate public education (a "FAPE"), which consists of special education and related services designed to meet the unique needs of the student, in accordance with a comprehensive IEP. See 20 U.S.C. § 1400(d)(1)(A), 1401(9) 1414(d); *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

A FAPE is offered to a student when (a) the board of education complied with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits. See *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206, 207 (1982). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Procedural violations lead to a finding that FAPE has been denied only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the

parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. See IDEA §615(f)(3)(E)(ii); 8NYCRR§200.5(j)(4)(ii).

A school district fulfills its substantive obligations under the IDEA if it provides an IEP that is likely to produce progress that is not trivial, but need not maximize the potential of a student with a disability. *Cerra v. Pawling Cent. Sch. Dist.*, 427 F.3d 186, 195 (2d Cir. 2005); *Rowley*, 458 U.S. at 197 n.21, 199.

An appropriate educational program begins with an IEP which accurately reflects the results of evaluations to identify the student's needs, establishes annual goals and short-term instructional objectives related to those needs, and provides for the use of appropriate special education services. See *Application of the Bd. of Educ. of the Granville Central School District*, Appeal No. 06-010.

The United States Supreme Court held in *Schaffer v. Weast*, 126 S. Ct. 528 (2005), that the "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." *Schaffer*, 126 S. Ct. at 537. The Court rejected the argument that every IEP is assumed invalid until the school district demonstrates that it is not (*Schaffer*, 126 S. Ct. at 536). Accordingly, the parents, as the party seeking relief at the impartial hearing, have the burden of persuasion to demonstrate that respondent failed to offer the student a FAPE.

The parents have raised several challenges to the IEP, the IEP meeting and the program offered. First, they have asserted that there was no general education teacher present at the IEP meeting. State

regulations require that a regular education teacher shall be included in the CSE "whenever the student is or may be participating in the regular education environment." 8NYCRR§200.3(a)(1)(ii). In the instant case, this student had severe global delays. The mother testified that the regular education environment would not have been appropriate and that it was not considered (T145 at 10-23). Therefore, I find that a general education teacher was not required at the CSE review.

The parents further assert that the Department failed to maximize exposure to the general curriculum. No evidence was submitted on this matter and no explanation given as to how the curriculum was deficient. I therefore find no merit in this argument.

The parents further assert that no individual parent training and counseling was offered. State regulations require that for students with autism, "provision shall be made for parent counseling and training . . . for the purpose of enabling parents to perform appropriate follow-up intervention activities at home." 8NYCRR§200.13(d). The district representative testified that the District 75 programs for autistic children includes such training. He testified that "there is no individual parent training and counseling offered as an IEP service because that is part and parcel of District 75 programs for children who are classified with autism." (T267 at 5-9). He further testified that such training is embedded in the program, but is not put on the IEP specifically because it is not a related service. (See T272 at 6-12). I find no reason to question the testimony of this witness. There is no contradictory testimony and no evidence that parent training and

counseling are not offered as part and parcel of a District 75 program for children classified with autism. The parents did not call any witnesses from District 75 or from the recommended school sites, or indicate that they had requested written materials from the Department concerning whether the District 75 program includes parent training. Nor did they request a continuation of the hearing in order to obtain such evidence.

The parents further assert that no educational evaluator and no school social worker attended the May 10 IEP meeting. State regulations require that an individual who can interpret the instructional implications of evaluation results be present at the CSE review. It further provides that such individual may also be the individual appointed as the regular education teacher, the special education teacher or special education provider, the school psychologist, the representative of the school district or a person having knowledge or special expertise regarding the student when such member is determined by the school district to have the knowledge and expertise to fulfill this role on the committee. The regulations further provide that a school psychologist attend the CSE review. There is no requirement that a social worker or an educational evaluator attend the meeting. See 8NYCRR§200.3(a)(1). The May 10 meeting included a district representative, a school psychologist, a special education teacher, and an ABA lead teacher. (See Exh. B, p. 2). There is no allegation or evidence that one of these individuals would have been unable to interpret the evaluations presented to the CSE.

The parents further assert that the Academic Performance and Learning Characteristics section, the Social and Emotional Performance section and one health and physical development section set forth on the May 10 IEP were copied from the March 24 IEP. I have compared the descriptions in those sections to the reports available to the CSE at the time the IEP meeting was held. The description of academic performance and learning characteristics accurately reflects much of what was written in the Progress report, dated March 28, 2006, and submitted as Exhibit I by the parents. The descriptions of the child's social/emotional performance closely reflect the descriptions in the Age-Out Report, dated March 7, 2006, and submitted by the parents as Exhibit K.

I also note that the fact that the descriptions in the May 10 and March 24 IEPs are similar is not surprising in the two dates are close in time. It is to be expected that much of the child's academic performance, learning characteristics, social and emotional performance and health and physical development might remain the same during such a brief period.

In contrast, the Health and Physical Development section did change from the March 24 IEP to the May 10 IEP. In the May 10 IEP, the section notes that T_____ is currently demonstrating motor skills at the 29 month level (Exh. B, p. 4). This corresponds to the information set forth in the Age-Out Report, dated March 7, 2006 (Exh. K, P. 3). This seems to represent an increase from the March 24 report, which states that his was functioning at the 24-25 month level. (Exh. C, p. 9) There is a corresponding

change in his goals on the May 10 IEP, removing a goal related to gross motor skills.

The parents further assert that the goals and objectives in the IEP are unduly ambiguous, are insufficiently challenging and are not objectively reasonable, that they are too vague and sparse and do not reflect T_____s present levels in order to create a meaningful baseline from which to assess T_____s needs. However, they point to no specific goals with which they disagree and presented no testimony regarding the appropriateness of the level of challenge or their reasonableness. In any event, I have reviewed the IEP, and find it to be comprehensive. It addresses a multitude of areas and covers all his areas of need as set forth in the evaluations submitted as evidence. The goals are generally clear and specific, and appropriate for the levels at which T_____ was assessed. I find that they provide adequate guidance to the child's teachers and providers regarding the CSE's expectations.

At the time the IEP was developed, many of the assessments and reports submitted as evidence had not been made. The speech and language progress report by Loretta Dowlat, dated March 28, 2006, however, had been available. The goals on the IEP related to oral motor skills, and expressive and receptive language skills reflect the needs expressed in the report. In particular, there are goals relating to oral-motor skills, including goals relating to drooling. The goals regarding expressive and receptive language skills include expanding vocabulary to include a variety of age-appropriate nouns. (Exh. B, p. 12-13). This reflects the report's suggestion regarding working on object identification.

The parents further assert that the Department failed to assess present levels. There is no evidence or argument to support this. The Age-Out report and speech and language progress report were comprehensive, set forth specific functional levels, described his needs thoroughly, and seemed to be considered in the development of goals on the IEP.

The parents also assert that the IEP is the by-product of policy and predetermination. In reviewing the IEP, I note that it is highly specific and tailored to T_____s current needs, including many changes from the IEP developed 7 weeks earlier. After reviewing the IEP and the mother's testimony, I can not conclude that the IEP was the product of predetermination. The mother does not allege that they had decided on his goals and placement before entering the room. She testified in fact that there was discussion of placement and some discussion of the child's needs (T114-115). There is no specific allegation that a particular area of the child's needs was inadequately discussed or that there was disagreement about his needs or the type of program or services needed (aside from speech and language therapy discussed below). Nor is it clear from her testimony that she was prevented from participating. There was no evidence that her questions or statements were disregarded.

I further note that the goals were not completely copied from the prior IEP, even though the prior IEP was written 7 weeks earlier. An effort was clearly made to incorporate new information, to review the assessments, reassess goals and needs and to make appropriate changes to the IEP, and an appropriate placement.

With respect to the speech and language services, however, the evidence indicates that these were the product of policy and predetermination. The mother testified that she questioned the amount of speech and language services which were being recommended, and that the committee members responded that "this is what we give and this is pretty straightforward", and that there was no ability to vary it. (T110 at 15-19). I agree that a preconceived notion of the appropriate quantity of speech and language therapy, based on formula or policy, is inappropriate, and that the level of services should reflect the needs of the child. Here it is undisputed that the child has severe speech and language delays and requires a good deal of help in this area. I note, as an aside, that New York State regulations require that students with autism receive a minimum of 30 minutes daily in groups not to exceed two, or 60 minutes daily in groups not to exceed six, of instructional services to meet the child's individual language needs. 8NYCRR§200.13 (a)(4). This is a minimum, not a fixed amount. The Department has offered 30 minutes three times per week of individual instruction to meet the child's individual language needs. It seems clear, however, that the child's classroom itself, which consists of six children, would provide an opportunity to address the child's individual language needs. Nowhere does the regulation require that the services be provided by a speech language pathologist.

Nevertheless, I find that the level of speech and language services, although they may meet the requirements of section 200.13(a)(4), do not meet the child's needs. Pursuant to the child's previous IEP, the March 24 IEP, the student was receiving five hours per week of speech and language therapy at

home (See Exh. C, p. 1). In addition, at that time, the student received three thirty minute sessions of speech and language therapy in school. The report of the speech language therapist, dated March 28, 2006, states that the student was making progress with three full hours per week of speech and language at home in addition to the three thirty minute periods of speech and language therapy in school. Nevertheless, she recommended that his services be increased to five hours per week. This was agreed to by the Department as part of his pre-school program.

I find that three thirty minute periods of speech and language therapy were not reasonably calculated to allow the child to make meaningful progress with his serious deficits in speech. I must therefore determine the amount of speech and language therapy which would meet his needs. The mother testified that when the child had been receiving three hours of speech and language therapy per week, that he had not been making progress other than to drink out of a straw. She testified that the drooling had not improved and that he had not been able to blow out a candle (T171 at 5-25). This, however, is contradicted by the report of the speech and language therapist, dated March 28, 2006. In that report, the therapist states that the child was receiving three hours of speech and language therapy per week and had made progress in decreasing his drooling, was able to blow three different types of whistles, varying in complexity, was able to chew on a chewy tube, as well as other accomplishments. In addition, she notes that he had begun to make progress with respect to expressive language and had improved his articulation. She also notes that his receptive language skills had been

beginning to improve. I find that three hours of speech and language therapy after school in addition to the three 30 minute sessions in school would be reasonably calculated to meet the child's needs.

The parents also allege that a functional behavioral assessment (an "FBA") or a behavior intervention plan (a "BIP") was warranted. New York State regulations require that "The CSE shall . . . in the case of a student whose behavior impedes his or her learning or that of others, consider strategies, including positive behavioral interventions, and supports and other strategies to address that behavior." 8 NYCRR 200.4(d)(3). An FBA is:

> ". . . the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment. The functional behavioral assessment includes, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it." 8 NYCRR 200.1(r)

The evaluations supply a good deal of information regarding T_____s behaviors. The educational update, dated January 11, 2006, and submitted by the parents, indicates that T_____ becomes frustrated when a particular toy is removed, when he is told no, or when demands are placed on him to

finish a particular task. The evaluator notes that his frustration is exhibited in compulsive and aggressive behaviors such as grabbing, pulling of hair and biting his hand. It notes that T_____ has exhibited the compulsive behavior of attempting to obtain hair or a small piece of fuzz that he win then mouth. The evaluation concludes that T_____ continues to respond to a highly structured, organized and routinized environment with his 1:1 assistant, and continues to make gains in almost all aspects of classroom life.

The Health and Physical Development section of the May IEP provides that "sensory input and a sensory diet are used to decrease [sensory seeking behaviors including biting his hand and mouthing hair and fuzz] and also to improve transitioning, body awareness and attention." Exh. B, p. 6. The Social/Emotional Performance section of the May IEP provides that "T_____ requires reinforcement and prompting to engage in non-desired activities." Exh. B, p. 4. The IEP also notes, under the section relating to social/emotional management needs, that T_____ requires "modeling, reinforcement, prompting of appropriate human (?) behavior." Exh. B, p. 4.

A letter from Linda Soldo of the Marcus Avenue Early Childhood Developmental Program, dated March 30, 2006, indicates that the one to one aide in the classroom facilitated his making progress, including decreasing the occurrence of aggressive behaviors with other children, and decreasing T_____s becoming upset and engaging in self stimulatory behaviors. (See Exh. J)

The mother testified that T_____ engages in behaviors such as pulling and eating hair, biting his hand out of frustration, pulling his ear if noises get too loud, walking, pacing back and forth, looking at things and running back and forth. She testified that these interfering behaviors are present both at home and at school, but less so at school because he is engaged. She further testified that it is better with the "one on one that he gets there" than just in a group session (T112 at 20-23; T112-113).

The evaluation and the letter of Linda Soldo indicate that the behaviors are being effectively addressed in a highly structured, organized and routinized environment with a 1:1 assistant, and that he is making gains. I note that the Department's recommendation continued to provide for a full time, 1:1 paraprofessional. I note that the CSE recommendation was for a 6:1:1 class with a full time paraprofessional. The information set forth in the IEP and in the evaluations relating to behavior, as set forth above, indicate that the nature of the behaviors are understood and are being effectively addressed, and that there is no need for an FBA or a BIP.

The parents also assert that the placement was not properly recommended, offered and identified at the IEP meeting. State regulations require that the CSE make a recommendation for a student who has been determined to be eligible for special education services. The Regulations provide that "[t]he IEP shall indicate the recommended placement." 8NYCRR§200.4(d)(2)(xii). In the instant case, the program recommendation was made at the CSE review, and a site was then offered to the parents by the Department. If the site offered had not met the

requirements set forth on the IEP, the parents could have validly contested the site. In fact, the mother testified that the Department offered a placement in P. 55 at 16, and after she had refused that placement, they offered another placement at P75. (See T103-105) Although the mother did not like either of the two sites offered, she did not assert that the either site was not in accordance with the recommendation on the IEP, or that it failed to meet state regulations as to composition, for example. I note, as an aside, that if she had disagreed with the program or goals set forth on the IEP, she could have raised these matters at the IEP meeting or requested a new meeting. Nor did she testify that she requested that the Department offer her a third and fourth site. Rather, she testified that she had seen many sites on her own and did not like any of them. (T101). Yet, there is no evidence that these sites would not have met the child's needs.

If the site recommended had failed to be close enough to the child's home to be the least restrictive environment, the parents could have validly contested the site. See 8NYCRR§200.4(d)(4)(ii)(b). (I note, however, that if there are no appropriate programs near the child's home, the least restrictive environment may be at a more distant placement). However, if the Department offered a placement which met the requirements of the IEP and was in the least restrictive environment, the parents would have no valid objection. Indeed, once the Department located a placement which met the requirements of the IEP and found the site closest to the child's home, that would be the most appropriate placement, and there could be not cause for objection by the parents.

The parents have not suggested a better system for the Department or the CSE to have recommended specific placements. The CSE identified a type of program, and then the parent was given the opportunity to see suggested sites. The Department seemed to be working collaboratively with the parent to find a site that would be agreeable to all involved. Thus, I fail to see how the parents were harmed by the failure to identify a site at the CSE meeting.

In sum, I agree with the parents that the child needs speech and language services in addition to those recommended by the CSE to be provided in school. I find, however, that the parents have not sustained their burden of proof that the overall program recommended by the CSE was inappropriate, except to the extent that outside speech and language services were not offered in addition to those offered in school. I note, in particular, that the parents called several witnesses who testified to support the programs in which the child has been unilaterally placed, but no witnesses (aside from the testimony of the mother) who testified as to the program which was recommended by the CSE. Since the parents did not submit any allegation, evidence or testimony relating to the program recommended by the CSE, and how it might be deficient, there is no basis for determining that the child needs additional applied behavioral analysis, or SETSS services, after school.

The parents have argued that the recommendation fell on procedural grounds, as well as those related to evaluation and goals on the IEP, but have not contested the school program recommended by the CSE. The parents do not argue that the CSE should have recommended additional speech and language

service in school. In fact, at the Rebecca School, the child is receiving two hours of speech and language services in school, only slightly more than the CSE recommended, and much less than the evaluators recommended. The parents assert that the child needs services in addition to those recommended by the CSE. I will therefore order that the child receive three additional hours of speech and language therapy after school, at the expense of the Department. I find that the parents did not meet their burden that the program recommended by the CSE was inappropriate.

I note that even if I had found that the program recommended by the CSE was inappropriate, the program at the Rebecca School would have failed as well, for failure to offer the amount of speech and language services which the child needs. It would be illogical to find that the recommendation of the CSE was inappropriate and then find that the unilateral placement was appropriate if it was lacking precisely the same service.

Moreover, the program at the Rebecca School does not offer the ABA services which the evaluations and the parents' witnesses testified he needs. (See T220 at 17-18). I note that the Educational Progress Report, dated October 23, 2006 (Exh. E) recommends that the child receive ABA services and the Age Out report dated March 9, 2006 recommends that he receive continuous one to one support (Exh. K). The Program Director at the Rebecca School testified that their program does not do discrete trials, use external things as a reinforcer as food or toys or time on a computer, which are elements of ABA. (T219 at 12-25)

She further testified that T___ requires the home based ABA services because "[h]e needs oral motor help. He needs help in being able to learn how to verbalize, as well as the sort of more strict behavioral approach which gives him — helps him with skill building for specific things that he may have trouble doing at home specifically, you know, sitting in a chair or, you know, brushing his teeth, things like that which are very specific skill based a more behavioral approach can be helpful with that, which could be very difficult for parents to teach all the time." (T220 at 25; 221 at 1-12)

Ms. Randazzo, the child's home SEIT provider testified that the ABA services she provides "teach him skills that he needs to learn and we do that one on one with him at home and at the school." (T237 at 11-14) I also note that Ms. Diamond, the child's other SEIT provider, contrasted the work she did with T_____ with the work being done at the Rebecca School, and testified that T_____ "definitely needs the support of the one on one structured setting in order to learn in that natural environment. Without the one on one support, I'm not sure he would acquire the same skills." (T65 at 11-17)

The fact that the parents have contracted for outside services to supplement the program at the Rebecca School does not make the placement at the Rebecca School appropriate. The testimony shows that the Rebecca School does not provide ABA services, and there was no testimony to indicate that the Rebecca School meets his needs in providing instruction in adaptive living: toileting, tooth brushing, washing of hands and feeding. Nor is it clear that the Rebecca School provides sufficient work on skills in general. It would be entirely

consistent with the testimony and evidence to conclude that the Rebecca School focuses on the child's relational and social interactions and relies on the ABA home provider to work on many of the basic skills. I note that Ms. Randazzo testified that she works with T_____ on his adaptive livings needs (T239), and that she had heard that the Rebecca School was working a lot on social skills. She testified that she could not be sure because she had not been to the school yet. (T263)

I find that the parents did not meet their burden of proof that the Rebecca School is an appropriate placement for T_____.

I turn now to the part of the request related to compensatory education. Compensatory education is instruction provided to a student after he or she is no longer eligible because of age or graduation to receive instruction. It may be awarded if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time. See *Mrs. C. v. Wheaton*, 916 F.2d 69 (2d Cir. 1990); *Burr v. Ambach*, 863 F.2d 1071 (2d Cir. 1988). Compensatory education is an equitable remedy that is tailored to meet the circumstances of the case. See *Wenger v. Canastota*, 979 F. Supp. 147 (N.D.N.Y. 1997). While compensatory education is a remedy that is available to students who are no longer eligible for instruction, State Review Officers have awarded "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation. See *Application of a*

Child with a Disability, Appeal No. 05-041; *Application of a Child with a Disability*, Appeal No. 04-054; *Application of the Bd. of Educ.*, Appeal No. 02-047.

The mother testified that T_____ did not receive any of his SEIT services until January 17, 2006 during the 2005-2006 school year. (T121 at 12-18), and thereafter, received six hours per week instead of ten hours per week for the remainder of the year. (T125 at 1-10). She further testified that T_____ received two hours per week of speech and language therapy from May 2006 until July 2006, and then received four hours per week thereafter, instead of the five mandated on the IEP. (T127 at 1-8). Since the child was missing ten hours per week of SEIT services for the first half of the year, and four hours per week of SEIT services for the second half of the year, I find that the child would be appropriately compensated by receiving seven hours per week of SEIT services for the 2006-2007 school year. In addition, I find that he would be appropriately compensated for the missing speech and language therapy services by receiving an additional 40 hours of speech and language therapy.

At the hearing, the parents requested that I order the Department to reimburse the parents for expenditures made for speech and language therapy at Emilia's Kids between September 28, 2005 and October 20, 2005. The parents do not assert that these expenditures were made to compensate the parents for the Department's failure to provide services mandated on the IEP in effect at the time. The parents did not assert in their request for a hearing that they are requesting reimbursement for these services because the IEP in effect at that time

was inappropriate; rather, they requested compensatory education for an unfunded mandate. Nor did the parents submit any evidence which would show that the evaluations conducted prior to the dates the services at Emilia's Kids were obtained indicated that such services were necessary. I therefore find that the request for reimbursement of these services does not fall within the request made in the due process hearing request (See Exh. A). The parents are free to make a new request for reimbursement for those services as long as it remains within the statute of limitations period.

The parents requested at the hearing that I order the Department to perform an assistive technology assessment. This request was not in the original request for a hearing, and therefore, I will not address it. However, I will order that the CSE consider the matter when they reconvene.

I THEREFORE ORDER That the Department provide three hours per week of individualized speech and language therapy after school during the 2006-2007 school year, beginning on the date hereof and continuing through the remainder of the school year. The parents may continue to use their current providers and the Department shall pay such providers directly or shall reimburse the parents, at the option of the parents, upon submission of appropriate documentation;

I FURTHER ORDER that the Department provide seven hours per week of SEIT services for the 2006-2007 school year, as compensatory education for the services the child did not receive during the 2005-2006 school year. The parents may continue to use their current providers and the Department shall

pay the providers directly for such services or shall reimburse the parents, at the option of the parents, upon submission of appropriate documentation. Such services shall be for seven hours per week multiplied by the number of weeks in the 2006-2007 school year;

I FURTHER ORDER that the Department provide forty hours of Speech and Language therapy as compensatory education for the services the child did not receive during the 2005-2006 school year. These services should be provided two hours per week for twenty weeks, beginning within 30 days of the date hereof, or on any other schedule agreed to between the parents and the Department. The parents may continue to use their current providers and the Department shall pay the providers directly for such services or shall reimburse the parents, at the option of the parents, upon submission of appropriate documentation;

I FURTHER ORDER that the CSE reconvene within 30 days of the date hereof to consider whether there is a need for an assistive technology evaluation as well as any other issues raised by the parents, and make any further recommendations it deems appropriate.

Dated: December 20, 2006

CORRECTED: December 28, 2006

/s/ Diane Cohen, Esq.
DIANE COHEN, ESQ.
Impartial Hearing Officer

DC:ds

PLEASE TAKE NOTICE

Within 35 days of the date of this decision, the parent and/or the New York City Department of Education has a right to appeal the decision to the State Review Officer of the New York State Education Department under Section 4404 of the Education Law and the Individuals with Disabilities Education Act.

"The notice of intention to seek review shall be served upon the school district not less than 10 days before service of a copy of the petition for review upon such school district, and within 25 days from the date of the decision sought to be reviewed. The petition for review shall be served upon the school district within 35 days from the date of the decision sought to be reviewed. If the decision has been served by mail upon petitioner, the date of mailing and the four days subsequent thereto shall be excluded in computing the 25- or 35-day period." (SNYCRR279.2[b]) Failure to file the notice of intention to seek review is a waiver of the right to appeal this decision.

Directions and sample forms for filing an appeal are included with this decision. Directions and forms can also be found in the Office of State Review website: www.sro.nysed.gov/appeals.htm.

DOCUMENTATION ENTERED INTO RECORD OCTOBER 16, 2006

A.	Hearing Request, 9/5/06	Parent
B.	IEP, 5/10/06	Parent
C.	IEP, 3/24/06	Parent

DOCUMENTATION ENTERED INTO RECORD NOVEMBER 14, 2006

D.	Annual Goals and Objectives, 10/26	Parent
E.	Educational Progress Report, 10/23/06	Parent
F.	Letter from Parents, 6/11/06	Parent
G.	Assisted Technology Evaluation Referral, 5/24/06	Parent
H.	Evaluation Report, 5/11/06	Parent
I.	Progress Report, 3/28/06	Parent
J.	Request to Continue 1 to 1 Aid, 3/20/06	Parent
K.	Age-Out Report, 3/7/06	Parent

L.	Educational Update, 1/11/06	Parent
M.	Language Update, 12/21/05	Parent
N.	OT Annual Review, 12/19/05	Parent
O.	PT Update, 12/14/05	Parent
P.	Letter, 12/1/05	Parent
Q.	Rebecca School Contract, 2006-07	Parent
R.	Rebecca School Canceled Checks, 2006-07	Parent
S.	Attendance Record/Log, 2006	Parent
T.	Jana Diamond's Certification	Parent
U.	Rosemary Randazzo's Certification	Parent
V.	Student Calendar, 2006	Parent
W.	Rebecca School Attendance Card, 9/13/06	Parent
X.	List of Schools Visited	Parent

Y.	Progress Report, 11/1/06	Parent
Z.	Progress Report	Parent
AA.	Canceled Check, Rebecca School 2006-07	Parent

DOCUMENTATION ENTERED INTO RECORD NOVEMBER 28, 2006

BB.	2005 W-2	Parent
CC.	Progress Report, 11/14/06	Parent
DD.	Occupational Therapy Summary, 11/14/06	Parent
EE.	Speech/Language Therapy Progress Report, 11/14/06	Parent
FF.	IEP, 10/28/05	Parent
GG.	IEP, 7/27/05	Parent

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of December, two thousand and nine,

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K.Y., T.Y., on behalf of T.Y.,

Plaintiffs-Appellants,

v.

NEW YORK CITY DEPARTMENT OF EDUCATION, Region 4,

Defendant-Appellee.

ORDER

Docket Number: 08-3527-cv

UNITED STATES COURT OF APPEALS
FILED
DEC 07 2009
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

Appellants K.Y., T.Y., on behalf of T.Y., filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: /s/ Richard Alcantara
Richard Alcantara, Deputy Clerk

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PROCEEDINGS

[START TAPE 1 SIDE 1]

HEARING OFFICER COHEN: Good morning. My name's Diane Cohen. This is a continuation of the T_____ Y_____ case. Today is November 28th, 2006, and it is now 9:35. I'd like each person in the room to identify him or herself for the record, please, by name and affiliation if any. Please begin on my left and go clockwise.

MR. KENNETH STARK: Kenneth A. Stark; School Psychologist, Chairperson Designee, Department of Education Region 4.

MR. K_____ Y_____: K_____ Y_____, T_____s father.

MS. T_____ Y_____: T_____ Y_____, T_____s mother.

MR. GARY MAYERSON: Gary Mayerson, T_____s attorney.

HEARING OFFICER COHEN: Okay. Mr. Mayerson, you have a witness you want to call?

MR. MAYERSON: Yes. I'm going to call T_____ Y_____. Actually, I'm going to call T_____--

HEARING OFFICER COHEN: (Interposing) K_____ Y_____.

MR. MAYERSON: It's been a Tuesday

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morning--K_____ Y_____, the father.

HEARING OFFICER COHEN: Okay.

MR. MAYERSON: I'll actually be fine.

HEARING OFFICER COHEN: Mr. Y_____, I just want to swear you in. Do you swear that the testimony you're about to give will be the truth?

MR. Y_____: Yes, I do.

HEARING OFFICER COHEN: Okay. Make your statement. Your name for the record?

MR. Y_____: My name is K_____ Y_____. I'm T_____ Y_____s father.

HEARING OFFICER COHEN: Go ahead.

MR. MAYERSON: Mr. Y_____, are you employed?

MR. Y_____: Yes.

MR. MAYERSON: What--by whom are you employed?

MR. Y_____: I work for the City of New York; I'm a steamfitter.

MR. MAYERSON: Okay. And where do you operate out of, what --?

MR. Y_____: Mostly Manhattan, but the five boroughs.

MR. MAYERSON: Okay and as a steamfitter what does that mean? What do you, just for the

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MS. Y_____: T_____ Y_____, T_____s mom.

HEARING OFFICER COHEN: Go ahead.

MR. MAYERSON: Yes, thank you. All right. Could you please turn to Exhibit B, which is the IEP, it's dated 5-10-06? Did you attend an IEP on 5-10-06?

MS. Y_____: Yes.

MR. MAYERSON: And is this a document--it says here it was given to parent on 5-10-06, did you in fact get this document on May 10, 2006? Did you get an IEP at the end of the meeting?

MS. Y_____: Yes, yes.

MR. MAYERSON: Okay. Do you have any reason to believe that this is not the IEP?

MS. Y_____: No.

MR. MAYERSON: Okay. All right. I'm looking to the second page of the IEP. Did anyone appear at the meeting and say I am going to be representing the district as the General Education teacher?

MS. Y_____: No.

MR. MAYERSON: Okay. Was there anybody from the Department of Education who had any discussions to say I want to give you input; I'm

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a General Education teacher and I can talk to that issue?

MS. Y_____: No.

MR. MAYERSON: Did anybody mention anything about the general curriculum or what it would take to modify the general curriculum for your son?

MS. Y_____: No.

MR. MAYERSON: Now, looking at the recommendations it says, special class in a specialized school District 75 with related services. When you were at the meeting did anybody identify any particular identifiable site by address as some place that they were recommending for your son to go?

MS. Y_____: Definitely nothing.

MR. MAYERSON: Did you ask, I mean, did you ask them where are you recommending for my son?

MS. Y_____: I did. They said that they would mail me something and then they gave me a phone number to call.

MR. MAYERSON: Okay and who was it at the meeting that gave you a phone number to call?

MS. Y_____: Neeson (phonetic)

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MR. MAYERSON: Okay. So what, if anything, happened following the Assistive Technology Referral?

MS. Y_____: Absolutely nothing. They mailed me the papers to have filled out by the teachers and the school and that was the last I heard from them.

MR. MAYERSON: So you asked for an Assistive Technology Evaluation, you got paperwork that you filled to go do it?

MS. Y_____: Right. I had all the teachers, all the therapists fill everything out, all their portions, I mailed it back, I spoke with Dick Gaines, he had told

me I received it, they will be in touch with the Board of Ed.

MR. MAYERSON: All right. So after you went through all these hoops . . .

MS. Y_____: Uh huh.

MR. MAYERSON: And did everything you're supposed to do, I think, did anybody get back to you and explain to you what the holdup was, if anything, as to why T_____ wasn't getting at least an Assistive Technology Evaluation?

MS. Y_____: I was not able to get any information at all regarding that.

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MR. MAYERSON: Right. Now, we've alleged in your Request for Due Process that one of the problems is that the Department of Education failed to assess his present levels. Has anybody assessed his present levels with respect to his need for Assistive Technology, even to date?

MS. Y_____: No.

MR. MAYERSON: Do you wish as part of any relief to be seeking here that the Department be ordered to get done the Assistive Technology Evaluation that they had promised earlier to give to you?

MS. Y_____: Definitely.

MR. MAYERSON: Is your son right--is he verbal?

MS. Y_____: He is not verbal, but he tries so hard to speak and words are starting to come, but he tries very, very hard.

MR. MAYERSON: Okay. Have people suggested to you that with an appropriate augmented communication device, whether it be a DynaVox or anything like that that because of his communicative--his desire to communicate that he will be able to develop a functional system of

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MS. Y_____: He has been getting early intervention starting at 2-1/2.

MR. MAYERSON: So how many years has that been?

MS. Y_____: Two and a-half years.

MR. MAYERSON: Okay. So is really the first year where you've had a problem where you've had to bring a due process?

MS. Y_____: Yes.

MR. MAYERSON: I have--I just want to check my notes, but I don't think I have any further questions of the witness. Exhibit Y, maybe I'll just do it. Exhibit Y that's a report from Amelia's Kids.

MS. Y_____: Okay.

MR. MAYERSON: And this is the report that you received with respect to the S/L services that are being provided?

MS. Y_____: Yes.

MR. MAYERSON: Do you expect to get ongoing reports as this service is continued?

MS. Y_____: Yes.

MR. MAYERSON: Oh, payments to the Rebecca School. Your husband seemed to think that you knew more about this.

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MS. Y_____: I do.

MR. MAYERSON: Okay. Why don't you tell me about that?

MS. Y_____: I spoke with Tina McCourt and explained to her that I was very interested in the program because they deal with communication, which is very important, and if there was any way that I could make payments instead of laying out the whole entire amount and she said definitely yes, that she would take 10,000 a month.

MR. MAYERSON: All right. Now, I'm looking here I found it. I was looking for this thing, it was driving me nuts, BB--if you can go to Exhibit BB.

MS. Y_____: Okay.

MR. MAYERSON: Okay. Is this your family's W-2 for 2005?

MS. Y_____: Yes.

MR. MAYERSON: Right. So the year that this salary's confirmed here it's 74,600 for that year including all the overtime? Including the overtime?

MS. Y_____: - -

MR. MAYERSON: I'm sorry. Okay. I see

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MR. MAYERSON: I'll take it. I mean, as I said, you weren't at the IEP so you are not responsible for anything that happened there, right?

MR. STARK: That's correct.

MR. MAYERSON: Okay. Now, you said that the way we do it here in the Department of Education that the placement, the site is not something which is developed and discussed at the IEP meeting that happens after the IEP meeting?

MR. STARK: The actual site.

MR. MAYERSON: Right.

MR. STARK: That is what occurred. That is factually what occurred.

MR. MAYERSON: Okay. Now, when you leave the New York City if you drive your car outside of the jurisdictional limits and you go to, let's say, Ardsley or if you go to Long Island or if you go to any of the boroughs that are outside, don't they do placement and program at the same meeting?

MR. STARK: Don't know.

MR. MAYERSON: Okay. Where in the law or in the regulations, if you're aware, is there some special exemption for New York City that

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gives it the special right to tell the parents at the end of the meeting bye-bye have a nice day, we're now going to develop the placement site for you? Where is it written that gives New York City that special policy where they can do that?

MR. STARK: I can't answer that question.

MR. MAYERSON: Okay. To the extent that New York City does it that way . . .

MR. STARK: Uh huh.

MR. MAYERSON: Do you agree that just because that's the way we've been doing is not a justification if something is not consistent with the law? I'll withdraw that. Do you know whether or not there's any legal support for the idea that it's okay to do the placement without the parents' participation at the IEP meeting in a direct and meaningful way.

MR. STARK: Placement is not done at an IEP meeting.

MR. MAYERSON: Here in New York City.

MR. STARK: That's what I understand so that's what I'm saying.

MR. MAYERSON: But why does New York City do it so differently than everywhere else in

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September 5, 2006

VIA FACSIMILE AND FIRST CLASS MAIL

Impartial Hearing Office
131 Livingston Street - Room 201
Brooklyn, NY 11201

Re: Demand for Due Process
T _____ Y _____ (DOB 12/19/01) v.
Region 4 (District 24)

Dear Sir or Madam:

We represent T _____ Y _____, a 4 year old boy diagnosed with autism. T _____ resides with his parents at _____ Street, Woodside, New York, 11414. On T_____s behalf, we respectfully request an impartial hearing to adjudicate declaratory,

reimbursement, compensatory, prospective relief, and any other relief the hearing officer deems appropriate pertaining to the appropriateness of the program being offered to T_____ for the 2006-2007 school year including the summer of 2007.

The Y_____s also seek reimbursement relief under Burlington/Carter, to the extent that they incur costs and expenses attempting to provide an appropriate educational program for T_____.

Additionally, we request that in the interim the district provide and fulfill pendency for the last agreed upon level of programming and services that T_____ is statutorily entitled to receive.

THE PROBLEM

For 2006-2007 T_____ is attending The Rebecca School, and he receives 6 hours weekly (1:1) SEIT services and 4 x 60 minutes group speech and language therapy. However, T_____ is mandated to receive 5 x 60 of speech and language therapy and 10 hours weekly (1:1) SEIT services pursuant to his last IEP.

We seek a compensatory award as a result of grossly unfulfilled IEP mandates from 2005-2006.

The Y_____ family attended a CPSE review on March 24, 2006 and also a CSE review on May 10, 2006 to discuss T_____s placement for the 2006-2007 school year. The outcome of this meeting was unsatisfactory, as well as the unreasonable behavior displayed by certain attendees at the meeting. The district created an IEP at this meeting. It is clear that the IEP proposed by the Department cannot pass inspection under the Part 200 Regulations, State Department Guidelines, or the applicable

decisional law. T_____s statutory entitlements include procedural, as well as substantive safeguards. The Department-proposed IEP is defective in the following respects:

- No general education teacher was present.
- The Department failed to maximize exposure to the general curriculum.
- Despite the classification of autism, no individual parent training and counseling was offered.
- No Educational Evaluator attended the May 10, 2006 IEP meeting.
- No School Social Worker attend the May 10, 2006 IEP meeting.
- The Academic Performance and Learning Characteristics report is copied directly from the CPSE review on March 24, 2006
- The Social and Emotional Performance Report is copied directly from the CPSE review on March 24, 2006
- One Health and Physical Development Report is directly copied from the CPSE review on March 24, 2006
- The goals and objectives in the IEP are unduly ambiguous, are insufficiently challenging; and are not objectively reasonable.
- The Department failed to properly assess "present levels".
- The present levels of performance in the IEP are too vague and sparse and do not reflect T_____s present levels in order to create a

meaningful baseline from which to assess T_____s needs.

- The Department's IEP is the by product of policy and predetermination
- The Department failed to develop an FBA or BIP, despite significant interfering behaviors.
- Placement was not properly recommended, offered, and identified at the IEP;

THE PROPOSED SOLUTION

The Y_____ family is seeking prospective, declaratory, compensatory and remedial relief, and any other relief the hearing officer deems appropriate. They also will seek reimbursement relief under Burlington/Carter, to the extent that they incur costs and expenses attempting to provide an appropriate educational program for T_____.

The Department should reimburse T_____s parents for tuition at The Rebecca School, 10 hours of SEIT services weekly and additional group speech and language therapy. T_____s pendency rights should also be honored. In addition, a compensatory award should issue as a result of the unfulfilled IEP mandate from 2005-2006.

CLOSED HEARING

T _____ requests a closed hearing at this time but reserves the right to make a final decision at the hearing.

ATTORNEYS' FEES AND OTHER COSTS AND EXPENDITURES

To the extent that T _____ "substantially prevails," T _____ seeks an award of attorneys' fees and the recovery of all related fees and disbursements.

Sincerely,

/s/ _____
Gary S. Mayerson

cc: The Y ____ Family
Region 4 (District 24)

REBECCA SCHOOL

Learning through relationships
www.rebeccaschool.org

REBECCA SCHOOL CONTRACT 2006-07

Deposit payment of $10,000 paid July 10, 2006.

I/We hereby enroll T_____ Y_____ at Rebecca School for the 2006-2007 school year. The total fee for the 12 month program is $72,500. We will pay the full amount by following this outlined payment plan:

July 31, 2006 first payment:	$10,000
August 31, 2006 second payment:	$10,000
September 30, 2006 third payment:	$10,000
October 31, 2006 fourth payment:	$10,000
November 30, 2006 fifth payment:	$10,000
December 31, 2006 sixth payment:	$12,500

Any other payment plan must be discussed with and have the prior approval of the Program Director.

This contract is for the entire academic year without deductions for absence, withdrawal, dismissal, or any other cause. This contract may be cancelled by written notice withdrawing the student on or before September 1, 2006, forfeiting the enrollment deposit. In the event that a student is withdrawn for any reason whatsoever after that date, I/we agree to pay damages to the school as follows: before the opening day of school, 75% of total payments for such student; after the opening day of school, 100% of the payments for the year for such student.

There is a late payment fee of $300 for the first 30 days a payment is late. Should an account be 30 days or more delinquent. the school, at its option, may advise parents that their child will not be permitted to attend. If there is another late payment there will be an additional fee of $300 for each subsequent 30 days a payment is late.

The school has the right, in its sole discretion, to dismiss from the school any student after prior discussion with the family, if the continued attendance of such student is deemed by the school not to be in the best interest of either the student or the school.

/s/ T_____ Y _____	7-25-06
Signature of Parent or Guardian	Date
Signature of Parent or Guardian	Date
/s/ Tina McCourt	7/25/06
Rebecca School Signature, Program Director	Date

Please make all checks payable to Rebecca School

40 East 30th Street, New York, NY 10016
T 212-810-4120 F 212-810-4121
info@rebeccaschool.org

These are the schools I looked at before choosing The Rebecca School. I also added the contact names.

2005 -- 224 @ PS 710 (718-225-8667) — very small program (Bayside)

2005 — P4 @ 179 Fresh Meadows 718-264 0916 — Rose Brewey — very loud disruptive over stimulation

2006, Jan. 30 HASC in Woodmere — Jule Leventhal 516 295-1340 ext 630 L.I.

2006, Mar. 8 P.7 @ 255 — Elmhurst 10 AM — OT & PT in hallway — many distractions very few classes

2006 Mar. 22 Northshore (Willet Ave. School) Wed. 10:00 AM Mary Thrawl L.I. loud

2006 Mar. 28 IS 993 @ PS 499 915 AM Yori Ioson — Queens College

2006, Apr. 6 Nothside [sic] Theraputic [sic] Center 930 AM Manhattan — not appropriate

2006, May 11 PS 50 Carol Ryan 1100 AM Manhattan — full lottery

2006, May 18 SLCD 10 AM Toya Davis, & Helen Mermelstein — does not accept autistic

2006, May 24 Gersh Acadamy [sic] 10 AM L.I. Charlene Schermer

2006, May 26 Blue Feather 1030 AM Joe Cordasco in Brooklyn awful

2006, May 27 Variety in L.I. 10 AM Judy Tabek — only very large classes

2006 May 30 Rebecca School 10 AM Tina McCourt — suits his needs

2006, June 9 P255Q@P160 Judy (Corona) Thursday 915 AM — sent to this location by Committee on Special Education. This school was totally inappropriate for my son & does not meet any of his needs. No prompt therapy, very rude staff, no gym or OT room — therapy in hallways & moved to trailer in summer.

Also phone contacts looking for schools

DDI — Mary Hoffman — can't accept Tyler

Genesis — ABA only — no PT — full

Acent — ABA only — no related services

Learning Spring — full

Parkside — full

Reese — no PT — full

Hawthorne — no PT — full

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

K.Y. and T.Y. on behalf of T.Y.,

Plaintiffs-Appellants,

-against-

NEW YORK CITY OF DEPARTMENT OF EDUCATION ("NYCDOE"),

Defendant-Appellee.

STIPULATION

Case No. 08-3527-cv

For purposes of inclusion in the Joint Appendix, the parties, by their counsel, stipulate as to the following facts:

(1) the NYCDOE issued a "Final Notice of Recommendation" ("FNR"), dated June 9, 2006, for T.Y.'s 2006-2007 school year;

(2) the FNR recommended that T.Y. attend P255Q @ P16Q, located at 41-15 104th Street, Corona, New York 11368, for the 2006-2007 school year; and

(3) the FNR was signed by "Howard Needleman."

Dated: New York, New York

By:

/s/

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(2)

No. 09-1066

APR 7 - 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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LEONARD J. KOERNER,*
PAMELA SEIDER DOLGOW
SUZANNE K. COLT,
of Counsel.
*Counsel of Record

April 8, 2010

QUESTION PRESENTED

Did the Second Circuit Court of Appeals correctly affirm the District Court's (1) denial of petitioners' claim for tuition reimbursement because petitioners failed to demonstrate that the IEP developed by DOE would have deprived T.Y. of a free and appropriate public education, and (2) granting of DOE's motion for summary judgment dismissing the case, where, *inter alia*, the Circuit Court concluded both that the failure to name a specific school for T.Y. within the IEP did not constitute a denial of a free and appropriate public education, and petitioners were included in the process of school selection ?

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THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

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No. 09-261

IN THE SUPREME COURT OF THE UNITED STATES

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

-against-

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION

COUNTER-STATEMENT OF THE CASE

Petitioners-appellants T.Y. and K.Y., on behalf of T.Y. ("petitioners"), appealed from a judgment of the U.S. District Court for the Eastern District of New York (Johnson, U.S.D.J.), entered July 2, 2008, see K.Y. ex rel. T.Y. v. New York City Dep't of Educ., 2008 U.S. Dist. LEXIS 89827 (E.D.N.Y. 2008) (Pet. App. 15-30), which granted

the motion of defendant-appellee, the Department of Education of the City of New York ("DOE," or "respondent"), for summary judgment dismissing the complaint. The District Court held that petitioners were not entitled to reimbursement of the tuition paid to a private school for their autistic child, T.Y., because they failed to demonstrate that DOE's plan for T.Y.'s education would have deprived him of a free and appropriate public education, and the Court of Appeals for the Second Circuit affirmed. See T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412 (2d Cir. 2009) (Pet. App. 1-14), holding that "an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA" (citations omitted).

Respondent requests that this Court deny the petition for a writ of certiorari seeking review of the Second Circuit's October 9, 2009 decision. The order below does not conflict in an important way with a decision of this Court or another court of appeals on any question petitioners attempt to formulate. Nor does the petition otherwise properly raise any other issue calling for this Court's exercise of its supervisory power.

Background

At the start of the 2006-2007 school year, T.Y. was a four-year-old boy who had been classified as having autism and presented with significant cognitive, language and developmental delays. During the 2005-2006 school year, T.Y. was in preschool class with eight students, two teachers, and one classroom paraprofessional at the Marcus Avenue Early Childhood Development

Program, where he received speech and language therapy, physical therapy and occupational therapy and the assistance of a full time one-on-one crisis management paraprofessional.

On May 10, 2006, the Committee on Special Education ("CSE") convened to formulate an individualized education program ("IEP") for T.Y., and to make recommendations for T.Y.'s 2006-2007 school year. T.Y.'s parents, petitioners in the present matter, participated in the meeting, as did a special education teacher, parent member, district representative, school psychologist, and an Applied Behavioral Analysis ("ABA") teacher. No general education teacher was present at the CSE meeting, because a general education program was not appropriate for T.Y., as his parents later conceded at the DOE hearing.

The IEP formulated on May 10, 2006, accounted for T.Y.'s then-current academic achievement and functional performance by assessing his language skills, impairments and deficiencies, his social and emotional skills, his physical development, and the state of his adaptive living skills. The IEP recommended that, given his severe cognitive and language delays, T.Y. not participate in a general education environment, except for supervised participation in activities such as lunch, assemblies, and trips. For these reasons, it was also recommended that T.Y. participate in alternate assessments and the IEP described how this would be accomplished.

The IEP set forth detailed annual goals and short-term objectives to measure progress towards those goals in a twelve page report. These goals

encompassed T.Y.'s primary needs, including language skills, oral motor skills, social and emotional skills, gross and fine motor skills, sensory processing, and adaptive living skills.

The CSE recognized that T.Y. exhibited some negative behaviors in response to frustration, such as hand biting, hair pulling, and aggression, and that he required reinforcement and prompting to engage in classroom activities. The IEP highlighted these behavioral needs by targeting negative behaviors in two of his goals.

The IEP recommended that T.Y. be placed in a special class in a specialized school within District 75 with a staffing ratio of 6:1:1 (six students, one teacher, one paraprofessional) for a twelve-month school year beginning in July, 2006. Additionally, a full-time, in-class, crisis management paraprofessional, and related services, including speech and language therapy three times weekly, occupational therapy twice weekly, and physical therapy twice weekly, were also recommended.

Following the issuance of the IEP, the DOE recommended P.S. 255 for T.Y., which petitioners visited and rejected. DOE next recommended P.S. 75Q, which petitioners also rejected, without visiting the school. Without seeking another public school recommendation, petitioners unilaterally enrolled T.Y. at the Rebecca School ("Rebecca"), a non-state-approved private school, for the 2006-2007 school year by first making a $10,000 deposit on July 10, 2006, and then entering into a contract with the school, signed July 25, 2006.

At Rebecca, T.Y. was placed in a class with a staffing ratio of 6:1:3, and received speech and language therapy and occupational therapy. The school also employed occupational therapists and physical therapists, and offered a sensory gym. T.Y. also required services outside of Rebecca that were recommended on his IEP, but that the school could not provide, including additional speech and language therapy, and ABA services.

Litigation History

By letter dated September 5, 2006, petitioners requested an Impartial Hearing for reimbursement for the cost of tuition at the Rebecca School as well as the additional out-of-school services T.Y. received. The letter included fourteen objections to DOE's May 2006 IEP.

The Impartial Hearing

An initial hearing was held on October 16, 2006, and the merits of the case were considered at an impartial hearing which was held on November 14, 2006, and which continued on November 28, 2006. Both parents were present and were represented by counsel. Appearing for DOE was Kenneth Stark, a school psychologist, Chairperson Designee. Various documents were introduced into evidence by the parents, including the IEP and other documents concerning T.Y.'s disabilities. Of particular interest were the reports that described T.Y.'s progress prior to the May 10, 2006 CSE, including the Educational Update of January 11, 2006, the Age-out Report of March 9, 2006 and the March 28, 2006 Progress Report. These reports detailed T.Y.'s disabilities, exemplified by

rudimentary ability to communicate, with both expressive and receptive language impairment, and oral motor deficits, including open mouth posture and poor control of oral secretions and significant drooling. His cognitive skills were described as "at the 18 month range," and his social-emotional development "at the 20 month level," and his communicative skills "at the 16 month age range." These levels were reflected in the IEP, and goals for improving his various skills were outlined in detail in the May, 2006 IEP.

Jana Diamond, an ABA therapist, testified on November 14, 2006, about the services being provided to T.Y. after school as well as his experience at the Rebecca School. Tanya Sanchez, a speech and language therapist, had been working with T.Y. for about one year, for three to five hours per week on his speech and communication.

K.Y., T.Y.'s father, testified on November 28, 2006, that he worked as a steamfitter for the City of New York, earning a base salary of $71,000 per. year, and an additional $10,000 to $20,000 per year in overtime work. He testified that he could not afford to pay the Rebecca School tuition for his son.

T.Y., T.Y.'s mother, testified as to (1) the IEP meetings; (2) the schools she had visited; (3) her difficulties in getting enough speech therapy for T.Y.; and (4) her belief that T.Y. needed the specific type of program offered by the Rebecca School with continual one-on-one attention for his behavior problems. Two more witnesses, Tina McCourt, a teacher from the Rebecca School, and Rosemary Randazzo, T.Y.'s private after-school ABA therapist, who provided six hours per week of 1:1

after-school ABA therapy, were called by petitioners to testify about T.Y.'s progress.

Kenneth A. Stark, a school psychologist for DOE, specifically addressed the objections expressed by the petitioners as follows. He testified that there was no need to have a general education teacher present at the IEP meeting because, as T.Y.'s mother conceded, T.Y. was not a candidate for general education. Mr. Stark also testified that the IEP did not mention parent training and counseling because, under the Commissioner's regulations, such training was "part and parcel of District 75 programs for children who are classified with autism". He also noted that an educational evaluator and a social worker were not present at the IEP because they were not required at this type of IEP. Mr. Stark also testified that a specific school is never suggested at an IEP meeting, but rather a program is recommended for the child, and a placement officer later helps parents choose a specific school that can fulfill the child's individual educational needs.

The Impartial Hearing Officer's Findings of Fact and Decision

The Impartial Hearing Officer ("IHO") issued a twenty-page decision on December 28, 2006 (Pet. App. 71-100). After reviewing the evidence in considerable detail, including a careful summary of petitioners' fourteen objections to the IEP, and a full account of the IEP itself, the IHO found that petitioners had not met their burden of demonstrating that the DOE's recommended program was inappropriate. The IHO first reviewed the Individuals with Disabilities

Education Act ("IDEA"), 20 U.S.C.§1400(d)(1)(A), which requires that all children with a disability be provided with a free, appropriate public education ("FAPE"). The IHO pointed out that (Pet. App. 81):

> A FAPE is offered to a student when (a) the Board of Education complied with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable a student to receive educational benefits. While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA. Procedural violations lead to a finding that FAPE has been denied only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.
>
> A school district fulfills its substantive obligations under the IDEA if it provides an IEP that is likely to produce progress that is not trivial, but need not maximize the potential of a student with a disability (citations omitted).

The IHO then discussed each objection submitted by petitioners and concluded that at

least ten of them were without substance (Pet. App. A 83-93). However, the IHO did agree with petitioners that the IEP did not meet T.Y.'s needs in regard to speech and language services and that he needed an additional three hours of speech and language therapy per week after school (in addition to his three 30-minute sessions in school) (Pet. App. 88-89), but concluded that this flaw in the IEP did not amount to a failure to provide a free and appropriate public education (Pet. App. 94).

The IHO also found that petitioners did not meet their burden of demonstrating that the Rebecca School provided an appropriate program for T.Y. (Pet. App 95-97).

The IHO ordered the DOE to (1) fund an additional three of hours of speech and language therapy, in addition to the speech and language therapy the Student was already receiving outside of Rebecca; and (2) provide certain compensatory services, which were related to a previous school year and are not at issue in this case (Pet. App. 99).

Petitioners appealed the IHO's decision to the New York State Education Department's Office of State Review by petition, dated January 30, 2007 (A 304-320). The DOE answered, but did not challenge the IHO's order to fund the additional speech and language therapy (A 321-339).

The State Review Officer's Decision

In a single-spaced, sixteen-page decision, the State Review Officer ("SRO") upheld the IHO's decision and agreed that petitioners did not demonstrate that the DOE's recommended program

was inappropriate (Pet. App. 33-70). After an exhaustive, detailed review of the documentary evidence and testimony, as well as the applicable statutes and precedent, the SRO concluded (Pet. App. 59):

> Based on my review of the IEP, I concur with the impartial hearing officer that the IEP was adequate. While the child could not be placed in a regular education class or program, his IEP properly described his needs, accurately reported his present levels of performance, set out goals in all appropriate areas of need, included appropriate short-term instructional objectives for each goal as a part of his alternate assessment program, recommended an appropriate placement for kindergarten, recommended appropriate strategies and a full-time paraprofessional to address his behavior, and provided related services in appropriate areas.

The SRO reversed the IHO on one point, finding that the provision of parent counseling and training should have been stated explicitly on T.Y.'s IEP (Pet. App. 59). However, the SRO held that the absence of the explicit provision did not deprive T.Y. of a free and appropriate public education (Pet. App. 59).

Having found petitioners did not meet their burden of demonstrating the DOE's program was inappropriate, the SRO did not consider the issue of

whether the petitioners' unilateral placement of T.Y. at Rebecca was appropriate (Pet. App. 69).

The Summons and Complaint

Petitioners served the summons and complaint herein on August 15, 2007, seeking (1) to reverse the SRO's and IHO's decisions; (2) a declaration that DOE failed to offer T.Y. a free appropriate public education for 2006-2007; (3) a declaration that T.Y.'s 2006-2007 placement at the Rebecca School was appropriate and reimbursable; (4) an order directing DOE to reimburse petitioners for Rebecca School's tuition and to provide full supplementary services; (5) a declaration that petitioners were the "substantially prevailing" parties; and (6) attorneys' fees. DOE answered on September 7, 2007, denying the allegations (A 58-64).

Petitioners then filed a motion for modified de novo review, which reiterated the demands set forth in the complaint. On April 7, 2008, DOE cross-moved for summary judgment. DOE attached its Local Rule 56.1 statement of undisputed facts, as well as various documents, including the entire transcript of the Impartial Hearing, and a twenty-one page memorandum of law. DOE argued that DOE had offered a free appropriate public education for T.Y., and petitioners had failed to meet their burden of demonstrating that DOE's program was inappropriate.

The District Court's Order

The memorandum and order of the District Court (Johnson, U.S.D.J.), affirming the decision of the SRO and granting defendants' motion for summary judgment was entered on July 2, 2008 (Pet. App. 15-30). The Court reviewed the history of the case, beginning with the May 10, 2006 CSE meeting (Pet. App. 16-20). The Court noted that the Committee addressed itself to T.Y.'s "significant cognitive, language and developmental delays," as well has his need for attention to "his language skills, impairments and deficiencies, his social and emotional skills, his physical development, and the state of his adaptive living skills" (Pet. App. 17). The Court also noted that the CSE had considered his negative behaviors and the importance of addressing them (Pet. App. 17). The Court also reviewed the specifics of the IEP's recommendations (Pet. App. 17-18):

> (1) that T.Y. be placed in a special class in a specialized school with a staffing ratio of 6:1:1; (2) that the normal school year be extended through an entire calendar year for T.Y.'s benefit; (3) that a full-time, in-class, crisis management paraprofessional be assigned to work with T.Y. on an individual basis; and (4) that T.Y. receive a number of related, school-based services such as speech, language, occupational, and physical therapy, two to three times each week. In addition, T.Y.'s program would have included counseling and training for his

> parents, as is required with any placement for an autistic student (citations omitted).

As the Court noted, the IHO concluded that "[petitioners] failed to demonstrate that the overall program developed and recommended by the DOE deprived the student of a free and appropriate public education" (Pet. App. 19).

The Court then set forth the standard of review as to administrative decisions under the IDEA, as defined by Walczak v Florida Union Free School District, 142 F.3d 119 (2d Cir. 1998), which held that where the Court does not have the specialized knowledge to resolve complex educational issues, it should defer to a thorough and careful decision of the state hearing officer (Pet. App. 21). After reviewing the requirements for an adequate IEP, the Court held, quoting Florence County School Dist. Four v. Carter, 510 U.S. 7, 12-13 (1999) (Pet. App. 22-23):

> A state board of education may be required to reimburse parents for the cost of an alternative educational program only if: 1) the educational program recommended by the board is deemed to be inappropriate under the law; 2) the program selected by the parent was appropriate in that it met the student's special education needs; and 3) the equities support the parent's claim.

The Court concluded that summary judgment was appropriate because (1) it deferred to

DOE's administrative hearing officers' extensive experience in the field of special education; (2) the IHO's and the SRO's decisions showed detailed and careful consideration of the issues herein, including over thirty documents in evidence, and the testimony of several witnesses during the three-day hearing (Pet. App. 24-25).

However, the Court concluded that its own review of all the evidence supported the same conclusion reached by the SRO (Pet. App. 25). The Court cited DOE's Rule 56.1 Statement, unchallenged by petitioners, which stated that "school officials made every effort, as required under the law, to fashion a plan that provided the child with the tools and support necessary to create an educational environment that would enable him to succeed" (Pet. App. 26-27). The Court noted that the SRO found that other plans were considered by the CSE for T.Y., but that after some discussion, they were replaced by an IEP better suited to T.Y.'s needs, thus defeating petitioners' argument that the IEP was a cookie-cutter, predetermined plan (Pet. App. 27). In addition, the Court cited the IEP's plan for a full-time paraprofessional to be with T.Y. throughout the school day, to minimize his negative behaviors, making a Functional Behavior Plan ("FBA") and a Behavior Intervention Plan ("BIP") unnecessary (Pet. App. 27-28). Also, the Court observed that the 6:1:1 ratio of students to teacher and teaching assistant was properly recommended in view of the CSE's knowledge of T.Y.'s prior progress (Pet. App. 28). And, although petitioners complained that they were not involved in the CSE's discussions, there was no dispute that they were present during the meeting and had an opportunity to express their opinions and concerns

(Pet. App. 28). Although the availability of "parent training and counseling should have been explicitly incorporated in the IEP," the failure to mention that such training was an integral part of DOE's education for all autistic children did not mean that the IEP failed to offer a free and appropriate education to T.Y. (Pet. App. 29).

The Court concluded that, petitioners having failed to establish that respondent's plan for T.Y. would have deprived him of a free and appropriate education, the SRO's decision to deny their request for reimbursement of their private school tuition was affirmed and DOE's motion for summary judgment was granted.

The Order of the Second Circuit Court of Appeals

The Second Circuit held that although the District Court's characterization of a Rule 56.1 statement as "necessary" was not entirely correct, it was an inconsequential error, as the District Court had conducted a thorough, independent review of the record. T.Y. v. N.Y. City Dep't of Educ., 584 F.3d 412 (2009) (Pet. App. 9).

In regard to substantive violations, the Court agreed with DOE that the Administrative Hearing Officers' opinions were "thorough and well-reasoned," and "deserve deference" (Pet. App. 10). "While the parents argue that a crisis paraprofessional was no substitute for a functional behavioral assessment or behavior intervention plan, there is substantial evidence in the record that the 1:1 aide provided significant benefits to the

child in addressing the problematic behaviors" (Pet. App. 10).

The Court found that the record indicated that the initial individualized education plan (IEP) "lacked the requisite speech and language services and parent training, but such errors were suitably corrected" by the hearing officers "and did not render the IEP as a whole substantively deficient" (Pet. App. 10). The Court saw "no reason to second guess the reasonable, professional determinations of the IHO and SRO in the case" (Pet. App. 10).

As to procedural violations, because there was no requirement in the IDEA that the IEP name a specific school location, the IEP was not procedurally deficient for that reason. The Circuit Court held that "an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA" (Pet. App. 13). The Court found that, in any event, T.Y.'s parents did participate in school selection, but they rejected the first two school options offered by DOE, one of them site unseen, and enrolled T.Y. in the Rebecca School without waiting for another recommendation by DOE. The Court held that IDEA grants the parents input as to school choice, but not a veto (Pet. App. 13-14).

REASON FOR DENYING THE PETITION

THE SECOND CIRCUIT'S DECISION AFFIRMING THE DISTRICT COURT'S ORDER AND JUDGMENT IS LEGALLY CORRECT AND DOES NOT CONFLICT IN A MEANINGFUL WAY WITH ANY DECISION OF THIS COURT, ANOTHER COURT OF APPEALS, OR OTHERWISE WARRANT FURTHER REVIEW BY THIS COURT.

Contrary to the argument of petitioners herein, there is no important conflict among the Circuit Courts of Appeals in their interpretation of the IDEA regarding an alleged requirement to name a specific school in the IEP. No Circuit has adopted the argument of petitioners that (1) the IEP must always specify the precise school it recommends for the subject child, and (2) in order for the parents to meaningfully participate in the process, they must be able to reject all placement suggestions made by the school district.

A. This Case is Not Certworthy

Petitioners' primary argument is that "the Second Circuit's decision is in direct conflict with the prior decision of the Fourth Circuit Court of Appeals in *A.K.*, [A.K. v. Alexandria City Sch. Bd., 484 F.3d 672, 680-681 (4th Circuit, 2007), cert. denied, 2008 U.S. LEXIS 1181 (2008)], which held that the school district violated the IDEA by not specifying a school site on the student's IEP" (Pet. 17). This characterization of the holding in A.K. is exaggerated and misleading, and it fails to take into account the significant differences between the circumstances surrounding A.K. and T.Y. Even

petitioners describe this alleged split as merely "unhelpful" (Pet. 16).

A.K. was a fourteen-year-old with several disorders, includingAspergers Syndrome in Alexandria City, Virginia, who, after encountering significant social difficulties in his Alexandria public school, enrolled at Riverview, a residential school for special needs children in Massachusetts, for the seventh grade. The Alexandria school system paid the equivalent tuition for a local private day school, and A.K.'s parent's were pleased with his progress. For the eighth grade, his IEP did not name any particular school, instead listed his placement as "Level II—Private Day School placement." Two schools for children with special needs had been discussed with his parents but were not named in the IEP. Because of their familiarity with those two schools, which they had themselves investigated and visited, and having consulted experts who knew A.K. and who were also familiar with the two schools, the parents decided not to formally apply to the schools and have A.K. interviewed, but instead to reenroll at Riverview. At their due process hearing, both sides presented testimony as to which school (one of the two private day schools or Riverview) would be appropriate for A.K.'s complex needs. Experts testified that both the recommended day schools were inappropriate for A.K., because their student populations included children with psychiatric and behavioral problems, which A.K. did not have, and which could cause serious problems for A.K. Both the hearing officer and the District Court denied the parents' claim, but the Fourth Circuit Court of Appeals reversed (484 F.3d at 681):

> Here, we hold as a matter of law that because it failed to identify a particular school, the IEP was not reasonably calculated to enable A.K. to receive educational benefits.
>
> * * *
>
> Especially in this case, in which the parents had tried in vain to find a local private day school that could meet A.K.'s specialized needs, the offer of an unspecified "private day school" was essentially no offer at all (id at 682).
>
> * * *
>
> We emphasize that we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided. There is no reason for us to frame the issue so broadly (emphasis added).

The Fourth Circuit took pains to clarify its position that, because A.K.'s needs were so particularized, the School District was required to offer a specific school that could satisfy his needs, not merely a generic "Level II—Private Day School placement," and that its holding in the case before it did not necessarily bind all other cases involving similar challenges to IEPs under IDEA.

Petitioners herein do not mention the Fourth Circuit's decisive refusal to hold that "a school

district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided."

In addition to their failure to mention the full holding of A.K., petitioners also make crucial misstatements in regard to the facts of the case herein. Petitioners repeatedly, and inexplicably, refer to "New York City's relatively rogue practice and policy of **unilaterally** determining . . . school placement" (Pet. 12) (emphasis in the original); see similar language at Pet. 17, 19, 21. Petitioners also refer to DOE's school recommendation as "dictated" and "final" (Pet. 17, 19).

However, there was nothing either final, unilateral, or dictatorial about DOE's attempts to find the right school for T.Y. The record clearly demonstrated, and the Circuit Court correctly held:

> We note, however, that notwithstanding our holding here, the evidence reflects that T.Y.'s parents did participate in school selection and that the NYCDOE worked cooperatively with the parents after they voiced their objections. The NYCDOE offered the parents one school, which they rejected. The NYCDOE offered the parents another school, which they also rejected without an on-site visit. The parents then enrolled their child into the Rebecca School without allowing the NYCDOE an opportunity to offer yet another school. The parents' actions

> suggest that they seek a "veto" over school choice, rather than "input"--a power the IDEA clearly does not grant them.

After analyzing the legislative history of the IDEA, as well as its own precedent regarding the issue of how "location" should be defined, the Circuit Court correctly held (Pet. 13):

> Therefore, we conclude that because there is no requirement in the IDEA that the IEP name a specific school location, T.Y.'s IEP was not procedurally deficient for that reason. We emphasize that we are not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements. We simply hold that an IEP's failure to identify a specific school location will not constitute a *per se* procedural violation of the IDEA (citations omitted).

Thus, comparing the above underscored statement with that of the Fourth Circuit ("we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided"), it is clear that the conflict between these two Courts of Appeals is not a meaningful one, if, in fact, it is a conflict at all.

Additionally, petitioners cite Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484 (2009), for the proposition that New York City is not entitled to a

special exemption from the requirements of IDEA (Pet. 19). This reference is without merit, since Forest Grove holds that parents may seek reimbursement for private school tuition when the public school has failed to provide a free appropriate public education, and that they may do so without having first tried the public school system. Because the Forest Grove school district's cursory examination of T.A.'s problems omitted testing him for ADHD, later discovered to be at the root of his learning disabilities, the Court held that T.A. had been denied a FAPE.

In marked contrast, at every level of the litigation herein (the Impartial Hearing, the State Review Officer's Decision, the District Court's Order, and the Order of the Second Circuit Court of Appeals), it was repeatedly emphasized that T.Y.'s IEP was thorough and detailed, and that it offered him a FAPE specifically designed to meet his significant developmental delays. Thus, the Order of the Second Circuit Court of Appeals herein does not conflict with this Court's holding in Forest Grove.

B. Petitioner's Second Point was not Raised Below, and Thus is Unpreserved.

Petitioners also raise a new issue, that of whether or not courts may look outside the four corners of the IEP to determine whether it provides a FAPE (Pet. 17-18).

In Singleton v. Wulff, 428 U.S. 106 (1976), this Court held, "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." Accord Exxon

Shipping Co. v. Baker, 128 S. Ct. 2605 (2008); United States v. Penev, 2010 U.S. App. LEXIS 1512 (2d Cir. 2010).

In any case, the specifics of this issue were not raised at all by petitioners, and were not touched upon by the Circuit Court or the District Court herein.

Additionally, the two cases cited by petitioners as evidence of a split between the Circuits in addition to A.K., are so fact-specific that they have little bearing on the case herein. In Sytsema v. Acad. Sch. Dist. No. 20, 538 F.3d 1306 (10th Cir. 2008), the IEP for the autistic child was not even completed, and the Tenth Circuit remanded the matter for consideration of whether the draft IEP substantially denied the child a FAPE, and required the District Court to consider only the written IEP. Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994), involved a autistic child whose school district offered him a placement in a school with no teachers trained to teach autistic children, and where he would be the sole autistic student, thus denying the child a FAPE. Both these cases included oral discussions of schools that were not documented.

Like A.K., both these cases, of course, present completely different situations than the one herein, where the IEP was thoroughly reviewed by the Hearing Officer, the State Review, the District Court, and the Circuit Court, and was correctly found to offer T.Y. a FAPE.

C. The Second Circuit Correctly and Thoroughly Analyzed the Proper Meaning of "Location" in IDEA.

Petitioners argue that the Second Circuit failed to give the "ordinary" meaning to the term "location" in the statute (Pet. 22-26). However, as petitioners concede, the term "location" is not defined in the statute (Pet. 22). Petitioners themselves failed to address the legislative history of the terms "location" and "educational placement" in the statute, which the Second Circuit expressly laid out (Pet. A-11, 12). As the Court noted, both the United States Department of Education's 1999 commentary, and the United States Senate's 1977 commentary indicate that "the term 'location' does not mean the specific school location, but the general environment of the overall program" (Pet. A-13). Thus, petitioners' argument that the word must be given its "ordinary" meaning (by which they mean a specific, bricks-and-mortar school), is contradicted by the Court's clear and rational analysis explaining why petitioner's interpretation of the language is incorrect (Pet. A-11).

Furthermore, petitioners' claim that the Court "inexplicably ignored" the statutes cited by petitioners is incorrect, because the Court reviewed petitioners' statutory argument and then concluded (Pet. A-11):

> While the parents' citation of the statute and regulations is, at first glance, compelling, upon closer evaluation we conclude that this language does not compel the result the parents seek.

Additionally, petitioners here revisit their argument that the statute gives parents membership status at the IEP meeting and beyond, but that the IEP herein somehow excluded them when it came, finally, to school choice (Pet. 23-24). The Court addressed that issue, as noted above, when it pointed out that petitioners "*did* participate in school selection and that the DOE worked cooperatively with the parents after they voiced their objections," concluding that membership did not entitle the parents to "veto" power (Pet. A-13).

Thus, for all the reasons set forth above, viewing the totality of the circumstances herein, the decision of the Second Circuit, affirming the District Court's dismissal of this action under the IDEA, does not conflict with those of the Fourth or other Circuits in a meaningful way. The Court properly concluded that (1) the failure to name a specific school in the IEP did not contravene the IDEA, and (2) in any case, the petitioners were included in the process of school selection.

Therefore, as the decision herein is legally correct, and does not conflict with any decision of this Court, it does not otherwise warrant further review by this Court. See Rule 10, Supreme Court of the United States Rules.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
April 8, 2010

Respectfully submitted,

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No.

Supreme Court, U.S.
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In the

Supreme Court of the United States

T.Y., K.Y., on behalf of T.Y., individually and on behalf of their minor child, T.Y.,

Petitioners,

vs.

NEW YORK CITY DEPARTMENT OF EDUCATION, REGION 4,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Individuals with Disabilities Education Act ("IDEA") provides educational rights and safeguards to children with disabilities. In 2007, Congress amended the IDEA and developed the Individuals with Disabilities Improvement Act ("IDEIA"). Both the IDEA and IDEIA strengthened the educational rights of children with disabilities, and the right of parents to be equal members of the Individualized Education Program ("IEP") team.

This Court, in *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (2007), expressly recognized that parents of children with disabilities have independent rights under IDEIA, including the statutory right to be members of any group that makes decisions on the educational placement of their child. T.Y.'s parents were denied this fundamental right when the school placement decision was unilaterally decided by the New York City Department of Education ("NYC DOE") **after** the IEP meeting, but without **any** prior consultation with the student's parents. Respondent studiously avoids any discussion of *Winkelman*.

New York City has over 300 different placement options in its "District 75" program. T.Y.'s IEP did not identify or recommend a specific school placement. That issue was never even broached for discussion at T.Y.'s IEP meeting, or even thereafter, because of the NYC DOE's established policy—a policy that **excludes** parents from the school placement decision. New York City has charted its own course, and has decided that it may simply send

parents a piece of paper, without any prior discussion, unilaterally selecting the student's school.

Excluding parents from the opportunity to meaningfully participate in the decision making process regarding the specific location and features of the student's school placement abrogates parental rights under IDEIA and *Winkelman*. It also gives rise to a most unhelpful split between the circuits. This Court should grant the writ to make sure that New York City and other municipalities do not get the idea that they may grant themselves special exemptions from the requirements of the Act.

The Second Circuit erroneously blamed T.Y.'s parents for not waiting longer for the NYC DOE to recommend an appropriate placement for T.Y. By the end of June, 2006, the NYC DOE failed to offer an appropriate placement for T.Y. T.Y.'s IEP was to start on July 1, 2006, leaving T.Y.'s parents with no choice but to timely mount a due process challenge.

As this Court recognized in *Forest Grove School District v. T.A.*, 129 S. Ct. 2484 (2009), children with serious disabilities simply cannot wait indefinitely, and parents should be able (under the IDEIA) to unilaterally place their disabled child in a private placement without trying out an inappropriate placement or waiting beyond the commencement of the school year.

Respondent misrepresents the underlying facts of this case, ostensibly to draw attention away from the salient issues. By way of example only, at page 5

of Respondent's brief, Respondent misrepresents that "additional speech and language therapy, and ABA services" were recommended as part of T.Y.'s IEP. That is not the case. In fact, even the impartial hearing officer explicitly found that the NYC DOE **failed** to offer T.Y. adequate speech and language services and ordered additional speech and language services as part of her decision. A recommendation that T.Y. receive ABA services was never made a recommendation on T.Y.'s May 10, 2006 IEP.

The Second Circuit's decision directly contravenes the rights of parents under IDEA, *Winkelman* and is in direct conflict with *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007).

I. REVIEW OF THE SECOND CIRCUIT'S DECISION IS NECESSARY TO RESOLVE A DIRECT CONFLICT IN THE CIRCUITS AND THIS CASE IS ONE OF IMPORTANCE TO ALL CHILDREN WITH DISABILITIES

Respondent implicitly acknowledges that there is a conflict in the circuits, but suggests that it is not important enough for resolution. The school placement decision, however, is not merely some minor, purely ministerial decision. It is a core issue that requires discussion and meaningful involvement of the student's parents **before** the decision is made.

The Second Circuit's decision in *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412 (2d Cir. 2009) effectually held that there is no free appropriate public education ("FAPE") deprivation when the

placement location is not on the IEP and is decided without the meaningful participation of parents. The Second Circuit's decision in *T.Y.* is in direct conflict with *A.K.* In both cases, the respective school districts failed to identify a location for the program services at the IEP meeting and on the IEP itself, that could fully implement the terms of the IEP. In both cases, the parents were unsure that an appropriate school would be identified that would adequately meet their child's individual and unique needs.

In *A.K.*, the Fourth Circuit held that the school district failed to offer a FAPE when its individualized education program—the IEP—did not identify a particular school placement. In *T.Y.*, in stark contrast, the Second Circuit held that,

> "[e]ducational placement" refers to the general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the "bricks and mortar" of the specific school. Further, the requirement that an IEP specify the "location" does not mean that the IEP must specify a specific school site." *See* 584 F.3d 412 at 10.

While Respondent selectively quotes language in an effort to distinguish *A.K.* as not being in

conflict with *T.Y.*, Respondent fails to address a significant portion of the Fourth Circuit's decision in *A.K.*:

> "But, certainly in a case in which the parents express doubt concerning the existence of a particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE." *See* 484 F.3d 672 at 683.

In *T.Y.*, the Second Circuit in effect holds that failure to identify a school will **never** amount to a deprivation of FAPE. There is thus now an unhelpful split in the circuits that warrants granting the writ.

The Second Circuit's decision also contradicts *Forest Grove*'s holding that parents do not have to try out an inappropriate educational placement for their child. The Second Circuit presumed that T.Y.'s parents sought a "veto" power but this is simply not true. Indeed, it is ironic that the Second Circuit was offended by what it perceived to be premature action by T.Y.'s parents, yet was unmoved by the NYC DOE's conduct in **excluding** T.Y.'s parents from the entire school placement decision.

II. REVIEW OF THE "FOUR CORNER" RULE WAS PROPERLY PRESERVED AND REQUIRES REVIEW

Petitioner properly preserved its right to ask this Court to review whether or not courts can look beyond the "four corners" of the written IEP in analyzing whether the content of the IEP provides the student with a FAPE. Petitioner repeatedly raised the issue of procedural violation at every level. Specifically, Petitioner challenged T.Y.'s IEP as procedurally (as well as substantively) deficient and claimed, *inter alia*, that no school *situs* appeared on T.Y.'s IEP and therefore, to determine FAPE, the court would have to look beyond the IEP to determine appropriateness. Petitioner has continuously argued that this is a procedural violation amounting to a deprivation of FAPE. At every level, petitioner has argued that IDEA requires that the anticipated frequency, **location** and duration of services and modifications be listed in the IEP pursuant to 20 U.S.C. § 1414(d)(1)(A)(vii).

Accordingly, this issue was properly preserved for this Court's review and respondent's argument that it was not properly preserved is erroneous.

III. REVIEW OF THE SECOND CIRCUIT'S FAILURE TO EMPLOY THE ORDINARY MEANING OF "LOCATION" IS NECESSARY

The case law is clear that when a term is not defined in a statute, it must be given its "ordinary meaning." The Second Circuit failed to give the term "location" its ordinary meaning and contorted the term location to mean something other than what it means in the context of 20 U.S.C. § 1414(e) and 34 C.F.R. § 300.501(c)(1). Just as respondent ignores *Winkelman*, respondent ignores these statutory references in its brief.

CONCLUSION

For the foregoing reasons and those stated in the Petition, Petitioners respectfully submit that their Petition for a Writ of Certiorari should be granted.

Dated: April 15, 2010

Respectfully submitted,

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